91-362

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

DIALAMERICA MARKETING, INC.,

Petitioner,

vs.

LYNN MARTIN,
Secretary of Labor, United States Department of Labor,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In upholding the decision of the District Court of New Jersey, which determined liability and allowed back wages to be awarded to over 350 non-testifying home workers solely on the basis of averaging hourly production rates ranging from 18 to 100 per hour as testified to by a non-representative group of 43 home workers, none of whom had any knowledge concerning the work that any of the hundreds of non-testifying home workers may have done, was the Judgment Order of the Third Circuit Court of Appeals in conflict with this Court's decision in *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946), which held that in a case under the Fair Labor Standards Act an employee seeking a back wage award has the burden to prove both "that he has in fact performed work for which he was improperly compensated and . . . [to] produce sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference."

2. In upholding the decision of the District Court of New Jersey, did the Third Circuit fail to adhere to the burden of proof requirement established by this Court in *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946), in holding that "representative testimony" could be used to make essential findings of facts and an award of back wages to an entire class of home workers when no other Court in the entire 50-year history of the Fair Labor Standards Act had ever used "representative testimony" or found a "pattern or practice" in connection with a homework operation and, further, when no Court in the entire history of the Fair Labor Standards Act, for any group of workers, has ever used a simple "average" of a broad and admittedly non-representative range of hourly production rates or hours worked to arrive at a blanket award of back wages to an entire class of employees about whose work no evidence whatsoever was offered?

3. In upholding the decision of the District Court of New Jersey, did the Third Circuit err in holding that liability findings and back wage awards, even as to those home workers who testified at trial, should be uniformly based upon a simple average of the widely varying production rates testified to, rather than each individual award being based upon that employee's testimony?

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Petitioner DialAmerica Marketing, Inc. ("DialAmerica") prays that a writ of certiorari issue to review the Judgment Order of the United States Court of Appeals for the Third Circuit, entered in the above-entitled case on May 30, 1991.

The decision of the District Court of New Jersey, upheld without opinion by the Third Circuit, strikingly conflicts with all prior precedent in this Court and all other Circuit

[1] Pursuant to Rule 29, DialAmerica Marketing, Inc., a non-public company, discloses that it does not have a parent company or any subsidiaries.

Courts of Appeal by relieving the Government of the burden of proving liability and individual damages in cases under the Fair Labor Standards Act of 1938 (the "FLSA"), 29 U.S.C. §§ 201 *et seq.*, where it sues on behalf of a class of homeworker employees. By extension, the holding below can be applied by the Government in equal pay and discrimination cases and by private litigants in class actions under Fed. R. Civ. P. 23. The Government was permitted to establish that back wage awards were due, and the amount thereof, with respect to a class of more than 400 former home telephone researchers by taking the testimony of a non-representative group of 43 of those home workers as to their individual hourly production rates (rates that widely ranged from *18* to *100* telephone cards researched in an hour); taking the simple average of those 43 different rates (*i.e.*, 53); and then, in total disregard of the researchers' testimony as to how much work they actually did, applying that "average" across the board to the 43 testifying home researchers — *and* also to the entire class of more than 350 non-testifying former home researchers.

The anomalous and inequitable result is to assign a uniform and so-called "representative" number of hours worked for each and every employee that bears absolutely no relation to the number of hours actually worked. Thus, for every 1,000 telephone cards researched in a week, each of the 43 testifying researchers are presumed to have worked exactly 18.8 hours and are awarded back wages solely as a product of those fixed hours, despite the fact that the District Court expressly found that the vast majority of those 43 researchers worked, on the one end, either 30, 40 or 50 hours to research 1,000 cards; or, on the other end, only 10 or 15 hours to complete 1,000 cards. The consequence is that virtually all of the 43 testifying home researchers are either vastly over-compensated or under-compensated. And because the Government failed to offer any evidence whatsoever as to how many hours the

remaining 350 members of the class actually worked, not only can it be assumed that such under- and over-compensation is the rule for the entire class, but those non-testifying home researchers were relieved of the entire burden of proving they were entitled to any compensation whatsoever.

In affirming such an inequitable and unreasonable result, the Third Circuit acted contrary to all prior precedent and failed to follow the decision of this Court in *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946), which held that in a minimum wage case *each* employee must prove that she has in fact performed work for which she was improperly compensated. *No Court* in the more than 50-year history of the FLSA has ever used "representative testimony" in a homeworker case, and *no Court* has ever permitted the Government, under the rubric of "representative testimony", to satisfy its burden of proof as to the number of hours worked by an entire class of employees by taking the simple average of widely divergent testimony (here, hourly production rates ranging from *18* to *100*) and assigning that "average" to the entire class. The irreconcilable and inequitable results flowing from the decision below underscores why no other Court has ever adopted such a course, and the fact that the decision below will have wide application in future FLSA and other cases urges the grant of the instant Petition.

OPINIONS BELOW

The decision of the United States District Court for the District of New Jersey is reported at 716 F. Supp. 812 and is printed in the Appendix hereto at A-3 - A-40. The Judgment Order of the United States Court of Appeals for the Third Circuit, which affirmed without opinion the District Court's decision, is printed in the Appendix hereto at A-1. The Third Circuit's Order denying DialAmerica's Petition for Rehearing is printed in the Appendix hereto at A-2.

JURISDICTION

The Judgment Order of the Third Circuit was issued and entered May 30, 1991. A timely petition for rehearing in banc was denied June 26, 1991, and the Third Circuit issued a certified Judgment Order in lieu of a formal mandate on July 16, 1991. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

The United States Department of Labor (the "Department") commenced this action in December 1981, alleging that DialAmerica willfully violated the minimum wage and recordkeeping provisions of the FLSA in connection with a home research program. Subject matter jurisdiction was conferred upon the District Court pursuant to the FLSA, 29 U.S.C. §§ 201 *et seq*. The appeal to the Third Circuit was from a final judgment in accordance with 29 U.S.C. § 1291.

On January 26, 1984, the District Court awarded summary judgment to DialAmerica and dismissed the Department's complaint on the ground that the home researchers and the persons who acted as distributors were independent contractors, and not statutory "employees", of DialAmerica within the meaning of FLSA § 203. On March 13, 1985, the Third Circuit affirmed that decision in part, holding that the distributors were independent contractors, and reversed in part, holding that the home researchers were statutory employees. *Donovan* v. *DialAmerica*, 757 F.2d 1376 (3d Cir. 1985). The Third Circuit remanded the case to determine whether DialAmerica had satisfied the minimum wage and recordkeeping provisions of the FLSA with respect to approximately 400 former home researchers.

DialAmerica thereafter filed a writ for certiorari with this Court, and that petition was denied on October 21, 1985. *DialAmerica* v. *Brock*, 474 U.S. 919 (1985).

On October 27, 1987, the District Court granted DialAmerica's motion for partial summary judgment, holding that DialAmerica did not "willfully" violate the FLSA because, *inter alia*, DialAmerica's treatment of the home researchers as non-employees was consistent with the Department's own Field Operations Handbook which governs employment relationships.

The issue to be tried in the District Court was what was the hourly production rate for each testifying homeworker and whether the trial testimony allowed a finding to be made of a "representative" rate that could be applied to the 350 non-testifying former homeworkers. At trial in September 1988, 24 former home researchers were called as witnesses, and the pre-trial deposition testimony of 19 others was submitted. In its Opinion, the District Court adopted, and annexed to its Opinion as Appendix C (JA 2226-27), the Department's proposed list of "low" and "high" production rates, and the "midpoint" between those low and high rates, for each of the 43 testifying home researchers (JA 2179-80).[2] The "midpoints" for the testifying researchers ranged from *18* all the way to *100*; that is, some home researchers completed 18 cards an hour, while others completed as many as 100 in an hour. The Court then held that the average of the 43 "midpoints" – *i.e.*, 53 cards per hour – was a "representative" production rate, and applied it uniformly to the 43 testifying and to all non-testifying home researchers to determine how many hours each worked back in 1980-82.

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[2] The Court's Opinion as reported at 716 F. Supp. 812 does not include Appendix A, B or C. A copy of Appendix C, which sets forth the production rates of the testifying home researchers, is printed in the Appendix hereto at A-37 - A-39. A copy of the Department's proposed list of rates that the District Court adopted is printed in the Appendix hereto at A-43 - A-44.

All references to "JA" are to the Joint Appendix filed with the Third Circuit upon DialAmerica's appeal.

That holding is without legal or factual support. *No other Court in the entire 50-year history of the FLSA has ever found a "pattern or practice" allowing the use of "representative testimony" in connection with a homework operation.* Further, *no Court in the history of the FLSA, for any group of workers, has ever "averaged" such a diverse range of numbers as appears on Appendix C to the District Court's Opinion to find a so-called "representative" figure.* On its face, there is absolutely nothing "representative" about a group of production rates that so widely range from *18* to *100*. More importantly, this holding totally relieves the Department from sustaining its burden of proving that the overwhelming majority of the home workers in fact performed work for which they were not properly compensated.

THE DECISION BELOW CONTRAVENES THE RULE ESTABLISHED BY THIS COURT IN *MT. CLEMENS*.

Indeed, the decision below contravenes the fundamental rule established by this Court in *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946). In that case, the Court held that when an employer fails to maintain the records required by the FLSA, a court may award damages to an employee, even though the result is only approximate, if the employee has successfully carried his burden by

> prov[ing] that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. . . .
>
> — 328 U.S. at 687.

The Court in *Mt. Clemens* did not mention when — or even if — representative testimony could ever be used

by the Department of Labor to meet its burden of proving that each worker in a class in fact performed work for which she was improperly compensated.[3]

PERMISSIBLE APPLICATIONS OF REPRESENTATIVE TESTIMONY

In the years since the *Mt. Clemens* decision, courts have permitted, in three very limited circumstances, what has become known as the "representative testimony" of a group of employees to be used to find minimum wage violations as to an entire class of employees. However, in each instance in which "representative testimony" has been permitted, sufficient indicia of proof were present to establish that the specific "representative" facts could be fairly applied to each member of the class of employees without undermining the burden of proof articulated in *Mt. Clemens*.

Thus, in the prototypical representative testimony case, the Department establishes a uniform pattern of practice of work methods, conditions and hours encompassing a class of employees. In such cases, the class of employees invariably work together in relatively regular shifts and under some degree of employer supervision, with the result that the testimony of a few members of the class of similarly situated employees as to the number of hours they worked can readily lead to quite reasonable inferences as to the

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[3] The *Mt. Clemens* decision dealt with whether workers on fixed shifts at a pottery plant were entitled to compensation for certain pre- and post-shift activities and for time spent after punching in while walking to job stations. The action was brought under Section 16(b) of the FLSA, 29 U.S.C. § 216(b), and under that provision, unlike here, workers must file a written consent to become members of the class for whom recovery is sought. The Court in *Mt. Clemens* had to decide what constituted compensable "working time" and whether it was too *de minimus* to require the employer to record it.

number of hours worked by all the employees who worked on that same shift. *E.g.*, *Donovan* v. *Bel-Loc Diner, Inc.*, 780 F.2d 1113, 1115-16 (4th Cir. 1985); *Donovan* v. *New Floridian Hotel, Inc.*, 676 F.2d 468, 472 (11th Cir. 1982); *Donovan* v. *Kaszycki & Sons Contractors, Inc.*, 599 F. Supp. 860, 864 (S.D.N.Y. 1984); *Marshall* v. *Sam Dell's Dodge Corp.*, 451 F. Supp. 294 (N.D.N.Y. 1978); *Marshall* v. *R & M Erectors, Inc.*, 429 F. Supp. 771 (D. Del. 1977); *see also Beliz* v. *W.H. McLeod & Sons Packing Co.*, 765 F.2d 1317, 1331 (5th Cir. 1985) ("Testimony of some employees concerning the hours worked by groups of non-testifying employees is sufficient if those who do testify have personal knowledge of the work performed by those who do not [testify]").

A second class of cases in which representative testimony has been used involve systematic or pervasive illegal actions taken by employers as to the class of employees as a whole, such as falsifying time records. For example, in *Brennan* v. *General Motors Acceptance Corp.*, 482 F.2d 825 (5th Cir. 1973), the testimony of 16 employees established that their supervisors had a "pervasive" and consistent practice of instructing the employees to report no more than 40 to 42 hours per week "irrespective of the number of hours actually worked". *Id.* at 827-28. Based on such testimony — *and* the testimony of a government investigator who interviewed 6 employees and examined the employer's falsified records (*id.* at 829) — the Court in *General Motors* found FLSA violations to have been established as to a class of 26 employees. *See Donovan* v. *Sovereign Security, Ltd.*, 94 Lab. Cas. ¶ 34,219 at 44,733 (E.D.N.Y. 1982) (representative testimony as to "systematic pattern of hour reduction"); *Donovan* v. *New Floridian Hotel*, *supra*, 676 F.2d at 472.

In the other class of cases that have permitted "representative testimony", there is substantial other evidence to

support the inference drawn from the representative testimony. In these cases, the "substantial other evidence" usually consists of an employer's admissions, testimony from government investigators concerning actual interviews of workers, surveys conducted of non-testifying workers and/or statistical evidence based on such interviews and surveys. *E.g.*, *Donovan* v. *Kaszycki & Sons Contractors, Inc.*, *supra*, 599 F. Supp. at 865-66; *Donovan* v. *Hudson Stations, Inc.*, 99 Lab. Cas. ¶ 34,463 at 45,900-01 (D. Kan. 1983).

Moreover, in almost all of these cases, the courts found that there was a pattern or practice as to the number of hours worked among the "representative" group of employees; *and* that there was a pervasive practice of falsifying the employees' time records, *and* that there was substantial other evidence consisting of, *e.g.*, interviews with or surveys of non-testifying employees corroborating the testimony of the testifying employees.

Further, and most significant, in all the cases in which representative testimony has been permitted, the facts established that the number of hours worked was virtually a uniform constant for the entire class of employees because, *e.g.*, the employees worked the same shift and were told not to report a certain number of hours worked. *See*, *e.g.*, *McLaughlin* v. *Seto*, 850 F.2d 586, 588 (9th Cir. 1988); *Donovan* v. *Bel-Loc Diner Inc.*, *supra*, 780 F.2d at 1115-16.

Thus, in the cases where representative testimony has been permitted previously, the requirement of *Mt. Clemens* that each employee prove that "he has in fact performed work for which he was improperly compensated" is satisfied, even as to the non-testifying employees, because the "representative testimony" of a group of employees establishes a uniform number of hours worked that can

reasonably be inferred to continue to be uniform as to the remaining non-testifying employees. In short, the testimony of the remaining employees would only be repetitions of those who had already testified.

THE HOLDING BELOW IS CONTRARY TO ALL PRIOR PRECEDENT AND IS IN CONFLICT WITH THE RULE ESTABLISHED IN *MT. CLEMENS*.

This case, however, does *not* fall within any of the three limited kinds of cases where representative testimony has been allowed to substitute for individual proof of liability and damges. Moreover, review of the midpoint rates on Appendix C shows that repetition of any particular rate is the clear exception to the rule of wide fluctuation.

Thus, the Department has never suggested that DialAmerica falsified records or engaged in illegal activity. Indeed, the District Court held that DialAmerica did not even commit a "willful" violation of the FLSA in that DialAmerica's treatment of home researchers as non-employees was consistent with the Department's own Field Operations Handbook. (JA 77)

This plainly also is *not* a case where employees work relatively regular shifts under some degree of employer supervision, such that the manner and rate of work is uniform for all workers. In fact, the Department admitted to the Third Circuit on the appeal the obvious fact that there was *no pattern* as to the home researchers' "hours or pace of work" (*see* Department's Third Circuit Appeal Brief pp. 6-7) and further admitted (at pp. 26-27 of its Brief) that "[b]y its very nature, home work is done at different paces and at different times and even in somewhat idiosyncratic ways". The District Court reached this same conclusion (716 F. Supp. at 814): "Each home researcher tailored his or her home research to fit his or her individual

needs and life styles". The very nature of homework precludes such a finding and it is for that reason that *no Court in the 50-year history of the FLSA has ever applied representative testimony in a homework case.*

The Department failed at trial to present any evidence whatsoever as to the work performed by any of the more than 350 non-testifying researchers. Despite the fact that the homework operation was ongoing during the Department's alleged investigation and did not terminate until six months after this action was brought, the Department offered no evidence of interviews of homeworkers, no work study observations, no survey conducted of their work, and no statistical study of any kind. Instead, the District Court found that the testimony of William Devins, a Department compliance officer, provided "the 'substantial other evidence' based upon which this Court may reasonably infer FLSA violations" (716 F. Supp. at 826), but that is erroneous as a matter of law. Mr. Devins was not involved in the original investigation of DialAmerica, and his trial "opinions" as to how the home researchers worked were categorically *not* based on any personal contact with any researcher or any observation of the homework. In fact, whereas his practice during 13 years as a compliance specialist consisted of "interviewing employees, making analy[s]es [and] talking with officials of the company" (JA 669), Mr. Devins did *not* interview a single home researcher; did *not* talk with a single representative of DialAmerica; *never* saw the homework performed; and did *not* attempt to make a statistical analysis of the production rates of any group of researchers (JA 790, 930-31).

Rather, Mr. Devins' "opinions" were based entirely upon his reading the deposition testimony of the researchers who testified at trial. There was no "other" evidence whatsoever. In every case in which a compliance officer's testimony was used as the "substantial other evidence", that officer

actually interviewed workers, conducted surveys and/or submitted statistical evidence.[4] None of that was done here. Indeed, Mr. Devins merely presented himself as a substitute finder of fact based on his reading of the pre-trial depositions of the testifying researchers, and even as to that he admitted that he "specifically [doesn't] really recall" what any researcher actually said.[5] Mr. Devins' personal opinion as to what the testifying researchers said at their depositions does not, *by definition and as a matter of law*, constitute the substantial *other* evidence on which an FLSA violation – or a designation of a "representative" production rate – may be based.

Again, the record evidence here permitted the Department to argue below only that there was a "pattern" with respect to "component parts of [the] work" that the home researchers did – *i.e.*, they all called directory assistance to research telephone cards. *The Department admitted that there was no pattern as to "their hours or pace of work"* (Department's Third Circuit Appeal Brief pp. 6, 27 (emphasis added)), and that is the only relevant inquiry in deciding whether there was a "representative" number of hours worked.[6]

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[4] *See Donovan* v. *Kaszycki & Sons Contractors, Inc.*, *supra*, 599 F. Supp. at 865-66; *Donovan* v. *Hudson Stations, Inc.*, *supra*, 99 Lab. Cas. ¶ 34,463 at 45,900-01.

[5] As the premise for accepting Devins' opinions, the District Court found that he had conducted "a thorough review of the deposition testimony of various home researchers" (716 F. Supp. at 819). It should be noted that when the District Court permitted DialAmerica "to test [his] credibility" (JA 846), Devins admitted: "*[s]pecifically, I don't really recall what individuals said in their deposition.*" (JA 848 (emphasis added)).

[6] For example, in *Marshall* v. *Brunner*, 500 F. Supp. 116 (W.D. Pa. 1980), *aff'd in part and rev'd in part*, 668 F.2d 748 (3d Cir. 1982)

(Footnote continued)

Indeed, the admitted and obvious fact that there is no pattern as to the production rates or the hours worked by the researchers is the direct consequence of the very different ways that the researchers went about their work. For example, many researchers had young children or infants at home and their time and concentration was limited by the demands of their children and household responsibilities. For example, Ms. Puletti testified that she worked only "the few minutes, five or ten I could find during the day" because of her baby. (JA 286) Ms. DeNorchia similarly testified: "That was another thing, I dropped him off at home, run home, my daughter would have a nap. I had, like, maybe a half [hour] to do some depending on any interruptions." (JA 1764) Ms. Cornelius "really [couldn't] remember exactly [how many hours I worked]. I had a baby and I was interrupted a lot". (JA 1739) The testimony of other researchers was similar, and is apparently the cause of many researchers having been able to complete only 25 or 30 cards during an hour. (*E.g.*, JA 155-157, 210, 237, 273, 352-53, 362, 371, 511-12, 533-34, 527, 1899, 1938, 2025-26)

In this same regard, while some researchers diligently devoted a block of several hours to the work and were able to maintain hourly production rates of 70, 80, 90 and 100, many others worked on an entirely casual basis and their production rates were consequently limited. For example, Ms. Carlson stated that she kept the cards "on the table and the phone was there and I did the work as I had the chance." (JA 380) Ms. DeNorchia kept the cards "all over

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(a non-homework case), the evidence showed that "all of the defendant's employees worked approximately an average of 56 hours during a five day work-week". 500 F. Supp. at 122. Moreover, in *Marshall* the employer kept "a series of inaccurate time cards" and the employees were instructed that "if they did not sign the cards, they would not receive their pay." *Id.* at 120.

the place" and testified, "Sometimes if I was doing dinner or something, I could get a batch done. I used to go back and forth to both phones." (JA 1765) Ms. Klee candidly testified: "If I felt like doing them all, then I would. If I wasn't in the mood I would slow down." (JA 265)

The kinds of telephones used also produced different rates. Some differences were slight, such as using touch-tone telephones or rotary dials. However, some researchers used telephones with speed dialing (*e.g.*, JA 140, 193, 440), while, in contrast, some used wall telephones and had to stand and walk to the wall for each call, (*e.g.*, JA 1576, 1798: "I would have to get up, punch in the number then sit down and wait until the call went through"; JA 2151). Still other researchers used telephone books, which could make the work go twice as fast (JA 1552, *see also* JA 373, 422, 564).

The speed at which researchers completed cards was also affected by the number of listings requested. Virtually all the researchers obtained multiple listings per call, and many stated that on occasion they were able to obtain 4 or 5 listings per call. In contrast, others made an appointment with an operator, usually at night, when they could research many cards with one call.

Thus, because the home researchers enjoyed complete freedom to choose how, when and at what pace to do the work, there was no "pattern" as to the *hours* or *work rates* of the home researchers who testified at trial such that a "representative" production rate could fairly be found to exist. Again, review of the production rates set forth in Appendix C plainly shows that there was no "pattern" of any kind, as the overall range of midpoints from *18* to *100* is not "representative" of anything.

The testimony of home researcher Chris Poss strikingly demonstrates the clearly erroneous and inequitable conclusions that flow from the use of such a "representative"

rate. Ms. Poss testified that in 1980 she would research cards at a rate of 50 per hour and that in 1981 and 1982, after she started to use a different kind of telephone, she researched cards at the rate of 100 per hour. (JA 440) Consequently, if Ms. Poss received 1000 cards in May 1981, the trial evidence shows that she would have worked only *ten* hours to complete those 1000 cards. However, the "midpoint" for her that appears on Appendix C incorrectly assumes that she had a constant production rate of 75 would have DialAmerica pay her on the basis of *13.3* hours (*i.e.*, 1,000÷ 75). Moreover, since the District Court held that the "representative" rate of 53 be used for all the researchers, DialAmerica has been ordered to pay Ms. Poss on the basis of almost 19 hours (*i.e.*, 1,000 ÷ 53) — *or almost twice the number of hours she actually worked.*

Similarly, Appendix C reflects a midpoint productions rate of 25 for Eileen Beatty. Thus, if she searched 1,000 cards, she would have worked 50 hours (1,000 ÷ 25). However, the "representative" result achieved by the courts below would have Ms. Beatty compensated on the basis of having worked only those same 18.8 hours to complete 1,000 cards (1,000 ÷ 53) — or for only 38 percent of the time she actually worked. Review of the production rates on Appendix C show that such anomalous results — *i.e.*, paying a researcher for either many more, or many fewer hours that were actually worked — occur in almost every instance as a consequence of uniformly applying the decidedly *un*representative rate of 53.

It is because of such irreconcilable and inequitable results that *no Court* had ever applied representative testimony in any employment situation by using "lows", "highs", "ranges", and "averages" of the kind set forth in Appendix C; *no Court* has ever found that representative testimony can be used in a homework case; and *no Court* had ever applied a "representative" rate as to testifying researchers

whose testimony shows a much different (whether higher or lower) rate. *E.g.*, *Hodgson* v. *Rancourt*, 336 F. Supp. 1119 (D.R.I. 1972). By definition, these situations cannot give rise to "representative" results.

Further, as the Department admitted at trial (JA 930-31), there was not even an attempt to determine if there is any statistical validity to declaring that a production rate of 53 is representative of the rates actually achieved by the more than 400 former home researchers. Moreover, there was not even an attempt to weight the average to give it some superficial validity. The result is that home researchers such as Ms. Mahaffey and Ms. Walsh, who each did the work on only 2 occasions and testified to production rates of only 18 and 30, respectively, were treated the same as researchers such as Ms. Antonacci and Ms. Rizzo, who worked productively over long periods of time and testified that they achieved production rates of 90 and 100, respectively. There is simply no legal, factual or statistically valid basis to hold that there is any kind of a "pattern" as to the individual production rates of those researchers, and to assign each of them a so-called "representative" production rate of 53.

There was, in short, a total failure of proof at trial as to the non-testifying former home researchers. The Department failed to offer any evidence of an investigation or any fact-gathering while the home researchers were still working in 1982. It failed to offer any evidence of any interviews with any non-testifying researchers, of any survey or of any statistical study. Instead, the Department based its case solely on the 7- and 8-year old recollections of a handful of researchers (some of whom took cards only 2 or 3 times) and who testified to production rates of 40 and 50 only after — as the District Court found at trial — they "spoke to the Government investigator". (JA 904-05)

Again, the use of "representative" testimony is an *exception* to the regular rule of evidence requiring each

individual to prove that she has been injured or is entitled to an award of damages. *E.g.*, *Anderson* v. *Mt. Clemens Pottery Co.*, *supra*, 328 U.S. at 687 (an employee has the initial burden to prove both "that he has in fact performed work for which he was improperly compensated and . . . [to] produce sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference"). Even in a *bona fide* class action under Fed. R. Civ. P. 23, "[w]ith respect to the calculation of the amount of damages it would be necessary for each member of the class individually to prove the quantity of gasoline purchased at supercompetitive prices and the price paid." *Bogosian* v. *Gulf Oil Corp.*, 561 F.2d 434, 456 (3rd Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978); *see also Sterling* v. *Velsicol Chemical Corp.*, 855 F.2d 1188, 1197 (6th Cir. 1988); *In re United Energy Corp. Solar Power Modules Tax Shelter Investments Securities Litigation*, 122 F.R.D. 251, 254 (C.D. Cal. 1988).

Indeed, in ruling that the Government had failed to sustain its burden of proof by making "assumptions" as to an entire class of employees in a discrimination lawsuit, this Court in *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977), held that essential findings of fact must be made as to each individual claiming to have been injured:

> While it may be true that many of the nonapplicant employees deserved and would have applied for line-driver jobs but for their knowledge of the company's policy of discrimination, *the Government must carry its burden of proof, with respect to each specific individual*, at the remedial hearing to be conducted by the District Court on remand.
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> — 431 U.S. at 371 (emphasis added).

The FLSA and all prior precedent preclude the Government from establishing necessary and critical facts as to a large group of employees by expediently "averaging" the conflicting, divergent and decidedly *non*-representative results culled from an arbitrarily selected group of employees. The decision below deviates from that rule, and in so doing it directly undermines the standard established in *Mt. Clemens* as to each employee's individual burden of proof.

CONCLUSION

The issue raised in this petition deserves the attention of this Court, because the question of whether the Government in an FLSA or similar case can sustain its burden of proof as to an entire class of employees simply by "averaging" the findings culled from the testimony of a few of those employees, plainly will arise repeatedly in the future. For this and the foregoing reasons, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 90-6003

RAYMOND J. DONOVAN, Secretary of Labor,
United States Department of Labor

v.

DIALAMERICA MARKETING, INC.,

Appellant

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil No. 81-04020)
District Judge: Hon. Alfred M. Wolin

Argued May 14, 1991

Before: HUTCHINSON, COWEN and SEITZ, *Circuit Judges*

JUDGMENT ORDER

After considering the contentions raised by appellant, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed. Costs taxed against appellant.

ATTEST:

/s/Sally Mryos

Sally Mryos, Clerk
Dated: May 30, 1991

By the Court,

/s/Robert E. Cowen

CIRCUIT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 90-6003

RAYMOND J. DONOVAN, Secretary of Labor,
United States Department of Labor

v.

DIALAMERICA MARKETING, INC.,

Appellant

SUR PETITION FOR REHEARING

BEFORE: SLOVITER, *Chief Judge;* BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO and SEITZ*, *Circuit Judges*

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/Robert E. Cowen
Circuit Judge

Dated: June 26, 1991

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* As to panel rehearing.

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

ANN McLAUGHLIN, Secretary of Labor, U.S. Department of Labor, Plaintiff, v. DIALAMERICA MARKETING, INC., Defendant.	Civil Action No. 81-4020 OPINION ORIGINAL FILED MAR 23 1989 WILLIAM T. WALSH, CLERK

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WOLIN, District Judge

Currently pending before the Court is an action commenced by the Secretary of the United States Department of Labor ("Secretary") alleging that defendant DialAmerica Marketing, Inc. ("DialAmerica") violated the minimum wage and record-keeping provisions of the Fair Labor Standards Act of 1938, 29 U.S.C. § 201 *et seq.* ("FLSA") in connection with its home telephone search program. Because of pronounced violations of the FLSA and a failure to pay a minimum wage to the participants in such program, the Court will order the payment of back wages and restrain DialAmerica from further withholding of minimum wages.

I. *BACKGROUND*

DialAmerica Marketing, Inc. is a Delaware corporation with offices in 20 states, including New Jersey, that employs over 2,400 people nationwide. For purposes of this action, DialAmerica concedes it is an enterprise within the meaning of Section 3(r) of the FLSA. Further, it agrees that it has gross volume of sales made or business done of not less than $250,000.00 and employees who are engaged in interstate commerce. Its business is telephone marketing of which a major part is the sale of magazine renewal subscriptions, its "expire" program. In order to sell these subscriptions, DialAmerica receives from publishers the name and address of subscribers whose subscriptions have or are about to expire. DialAmerica prints cards with the name and address of each subscriber ("expire cards"), has its employees attempt to locate a telephone number for each card, and then forwards the subscriber information to its sales offices throughout the country where telephone salespersons contact the subscribers in an attempt to sell magazines.

Initially, DialAmerica employed in-house researchers at its Teaneck, New Jersey location to obtain subscribers' telephone numbers from telephone books and from directory assistance. In 1976, DialAmerica expanded its telephone number search capacity by instituting a home researcher program. DialAmerica

initially recruited home researchers through five advertisements in a local shopper newspaper, but after May 1979, all prospective home researchers, upon hearing about the program from friends or family members, sought out DialAmerica for the opportunity to do home research. These people made an appointment to speak to someone in DialAmerica's lead processing department. At that time they were taught how to fill out a magazine expire card, and those who desired the homework signed an independent contractor agreement. DialAmerica never rejected anyone who wanted to be a home researcher. Between 1980 and mid-1982, DialAmerica employed hundreds of home researchers.

The *modus operandi* employed by DialAmerica required that a home researcher travel to DialAmerica's Teaneck office. At that time he or she would be given a box of 500 cards to research and would make an appointment, generally for one week later, to return the cards and pick up new ones. If the researcher desired more time, he or she could reschedule the appointment. A home researcher could ask for as many cards as he or she wanted to research subject to a 500-card minimum and card availability. Experienced researchers would pick up as many as 3,000-4,000 cards per week. Researchers were restricted to the extent that they could not pick up a new group of cards to research until they had completed the group previously taken. The cards, when given to a home researcher, were presorted by state and area code, and home researchers were permitted to request cards containing addresses from states of their choice.

These home workers then brought the cards home and attempted to obtain telephone numbers for the subscribers designated on each card. Numbers found were written on the card and the card became completed and compensable. The home researcher was unrestrained in the time he or she wanted to expend to complete the cards, since DialAmerica did not require a minimum or maximum number of hours. Nor was there an obligation to complete the cards that were taken. Some home researchers chose to spread the work over a full week regardless of the number of cards to research; some necessarily worked a

full week because of the large number of cards; and some completed the work in two or three days. Each home researcher tailored his or her home research to fit his or her individual needs and life styles.

The home researchers were paid on a piece rate basis — initially five cents, later seven and then ten cents — for each subscriber telephone number found. Occasionally, the piece rate was higher for groups of cards which involved subscribers for whom numbers were difficult to locate (*e.g.*, children) and where the success rates were particularly low. By contrast, in-house researchers were paid the FLSA minimum wage for all hours worked. DialAmerica also required the home researchers, unlike the in-house researchers, to fill out independent contractor or subcontractor applications and to sign independent contractor agreements.

In addition to the home researchers who picked up their cards directly from DialAmerica's Teaneck office, six or seven home researchers ("distributors") also distributed cards to other home researchers ("distributees") who could or would not travel to the Teaneck office. The distributors received one cent above the piece rate for each number found by their distributees. They received one check for the gross amount of all listed numbers found by them and by the distributees to whom they gave cards. Some of the distributors paid their distributees the full piece rate and kept the one cent; others paid less than the piece rate to their distributees. Originally, DialAmerica required the distributors to obtain signed independent contractor's agreements from their distributees. Copies of these agreements were initially retained by DialAmerica. Later in the program, when it ceased to require distributees to sign such agreements, the existing agreements were discarded. These distributors were not subject to any supervision from DialAmerica in running their distributor operations. DialAmerica had no contact with the distributees and does not possess records of the names of the distributees.

For each of the home researchers (other than for distributees), DialAmerica maintained detailed records listing for each week

the number of cards the home researcher received, the applicable piece rate, the number of cards for which listed telephone numbers were found and the total amount paid for that week. Because DialAmerica erroneously believed that the home researchers were not "employees" and were properly paid at a piece rate, DialAmerica did not keep any records of the number of hours the home researchers worked or the number of cards any of them could research in an hour (*i.e.*, their respective production rates). Nor did DialAmerica require the home researchers to maintain a handbook recording the number of hours they worked. Thus, no home researcher kept any record of the rate per hour at which he or she could research cards.

In June 1982, during the pendency of this lawsuit, DialAmerica ceased the home research program and terminated the employment of all of the home researchers except for a few who commenced working at defendant's Teaneck office.

II. *PROCEDURAL HISTORY*

This case was initiated by the Secretary of the Department of Labor alleging that defendant DialAmerica willfully violated the minimum wage and recordkeeping provisions of FLSA in connection with its home telephone research program.

By an Opinion and Order dated January 26, 1984, this Court (Stern, J.) dismissed the complaint and awarded summary judgment to DialAmerica on the ground that the home researchers and distributors were not "employees" within the meaning of FLSA § 203, but were instead independent contractors. The Third Circuit Court of Appeals affirmed that decision in part and reversed in part on March 13, 1985, finding that the distributors were independent contractors, but that home researchers were statutory employees. *Donovan v. DialAmerica*, 757 F.2d 1376 (3d Cir.), *cert. denied*, 474 U.S. 919, 106 S. Ct. 246 (1985). The Third Circuit remanded the matter to this Court for a hearing on the Department's claim that DialAmerica had not satisfied the minimum wage and recordkeeping provisions of the FLSA with respect to the home researchers.

On October 27, 1987 this Court (Lechner, J.) granted DialAmerica's motion for partial summary judgment, holding that DialAmerica did not willfully violate the FLSA in treating home researchers as non-employees to whom the FLSA did not apply. The Court held that DialAmerica was not aware that its classification of home researchers as independent contractors was in violation of the FLSA and that its actions were not in "reckless disregard of the FLSA" pursuant to the Third Circuit standard set forth in *Brock v. Richland Shoe*, 799 F.2d 80, 81 (3d Cir. 1986), *aff'd*, __ U.S. __, 109 S. Ct. 1677 (1988). The Court also held that the Department's failure to reveal any evidence indicating willful behavior on the part of DialAmerica warranted the application of the standard two-year statute of limitations under the FLSA (as opposed to the three-year limitations period applicable to willful violations).[1]

A bench trial was held on September 6, 7, 8, 22 and 23, 1988 in which this Court considered whether the Department could sustain its burden of proving that DialAmerica failed to comply with the minimum wage provisions of the FLSA with regard to any individual home researcher, and if so, whether the Court may order the payment of back wages to such persons. Necessary to that decision is the determination, through either direct or representative testimony, of the number of hours worked by each home researcher.

III. *EVIDENCE PRODUCED AT TRIAL*

A. Former Home Researchers — Raw Data

The bulk of the evidence presented at trial consisted of the testimony of 43 former home researchers, 24 live before the Court and 19 by deposition. With respect to each witness, the identical inquiries were made, namely, the number of cards completed per week; the number of hours expended per day and per week to complete a given number of cards; the method by which each witness engaged in the researching process; the usual

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[1] Thus, the instant case is limited to the examination of home researchers who worked within the two-year statutory period (*i.e.*, the award of back wages will only be considered with respect to those who worked after January 1, 1980).

number of telephone listings each could receive from an operator; the amount of money received per card researched; and finally, an estimate of the number of cards per hour that could be completed by the witness. Most witnesses received between 500 and 1,500 cards per week and processed them at rates on the average falling between 30 and 60 cards per hour. The witnesses generally testified to their ability to obtain between two and three listings from one operator, but claimed that some states were more generous in providing multiple listings.

Initially, home researchers were paid five cents per number found. That amount subsequently increased to seven and then to 10 or 20 cents per number found. In 1980, the FLSA minimum wage was $3.10/hour, increasing to $3.35/hour in 1981 and 1982.[2] Most home researchers also testified that they were provided with written instructions directing them to pass over cards naming all schools, libraries, army bases, government installations and hospitals.[3]

The witnesses at trial were asked whether they kept records of the hours spent researching a given number of cards. Several replied that they had maintained records at one time, but have since disposed of them; several claimed that they had timed themselves, but had never recorded their hours; and several, namely, Christine Poss, Thomas Milo, Rina Herdman and Roxanne Catrambone, submitted their records to the Court.[4]

Those former home researchers who submitted records also operated as distributors, and their records set forth the number of cards given to distributees; the number of listed numbers found by the distributees; the amount paid by the distributor to the distributee; and in some cases, the rate of pay (*i.e.*, five cents/card), including the commission received by the distributor at one cent above the rate received by the distributee. However, the number of hours worked by each employee was not recorded and was unavailable to the Court.

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[2] The years of concern in this case are 1980 to 1982.

[3] *See* Stipulation, Exhibit 115, at 22, 25.

[4] *See* Exhibit Nos. P-3 and P-4 (Poss' records); P-9 (Milo's records); and P-2 (Catrambone's records).

Despite these somewhat detailed records, the principal issue persists: What was the production rate of each home researcher? This inquiry is necessarily relevant to the crucial determination of back wages due, and cannot be answered until the number of hours worked by each home researcher is ascertained. Since none of the testifying witnesses recorded the number of hours worked, this Court must, among other factors, look to their recollective estimates.

B. *Compliance Specialist – Statistical Data*

(1) *Calculation of Hours Worked;*

In an effort to resolve the issue as to rates of production, the Department of Labor called compliance specialist William Devins as an expert witness. Devins testified that he was assigned the task of developing a computerized summary of all of the available data, including both the business records of Dial-America[5] and the records supplied by several former home researchers.

Because all available data were incomplete, Devins developed and advanced a number of mathematical formulae designed to solve for particular variables depending upon the information provided by the records under consideration.

First, he assumed that a worker who is able to process 50 cards/hour (a figure readily ascertained from individual witness testimony) would expend 10 hours to complete 500 cards in one week.[6]

$$\frac{\text{500 received}}{\text{50/hour}} = \text{10 hours}$$

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[5] Exhibit S-111 (Production Records of DialAmerica) and Exhibit 10 (Dial-America Payroll Analysis – Cards/Hour Below Which Minimum Wage Exists).

[6] Tr. 605.

In order to earn the minimum wage in that particular week, the worker would have had to be paid $31.00. ($3.10 X 10 hours)[7]

(2) *Calculation of Cards/Hour*

Devins' formula to solve for an unknown number of cards/hour is

$$\text{cards/hour} = \frac{\text{minimum wage X cards processed}[8]}{\text{minimum wage due}}$$

The production rate for the hypothetical employee would, therefore, equal

$$\frac{\$3.10 \times 500}{\$31.00} = 50 \text{ cards/hour}$$

Hence, if the minimum wage due ($31.00 with our hypothetical researcher) is equal to actual pay, then the calculation of cards/hour will reveal the number of cards that this worker would have had to process in the week in question in order to earn the minimum wage.

(3) *Calculation of Number of Cards/Hour Below Which a Minimum Wage Violation Exists*

Assuming that the following information is available for the hypothetical employee,

Date	Min. Wage	Rec'd.	Lstd.	Rate	Actual Pay
1/20/80	$3.10	1359	416	0.20	$83.20

the inquiry here is what number of cards/hour would this worker have had to process in order for actual pay received ($83.20)

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[7] Tr. 606.

[8] This formula will yield the proper production rate only if one accepts the Department's assumption that a card received is equivalent to a card processed.

from DialAmerica to have sufficiently provided the minimum wage of $3.10 in 1980?[9] Devins suggests that the proper formula is

$$\text{cards/hour} = \frac{\text{minimum wage X cards processed}}{\text{gross pay}}$$

Inserting the known sample data,

$$\text{cards/hour} = \frac{\$3.10 \text{ X } 1359}{\$83.20} = 51.$$

This solution demonstrates that this employee would have had to process 51 cards/hour in order for $83.20 to provide the appropriate minimum wage.[10] With a production rate of 50 cards/hour, this employee would be one card short of the number necessary in order for her actual pay to provide the minimum wage.

Appendix A further displays Devins' mathematical analysis by providing a sample work week for each testifying employee (excluding distributees), and indicating the rate of production (*i.e.*, cards/hour) that each worker would have had to achieve in the given week in order for actual salary received to reach the equivalent of the minimum wage.

Clearly, only three of the 33 witnesses accounted for in Appendix A achieved, or conceivably could have achieved, the rates of production required to render their given salaries consistent with the appropriate minimum wage.[11] As for the remaining thirty witnesses, the numbers in the far righthand column

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[9] How this translates into back wages due is calculated in Part IIIB(4), infra.

[10] Tr. 611, 612.

[11] These employees are Piper, at 37 cards/hour, a conceivable rate of production; Sarfatty, at 52 cards/hour, who may have had the ability to process cards at such a rate; and Poss, at 43 cards/hour, who could also conceivably have reached such a production rate.

("Minimum Wage Viol. Below Indicated Cds/Hr.") establish obvious violations in the sample weeks. For instance, M. Sullivan, in receipt of 545 cards, would have had to, based upon Devins' formula, process cards at the impossible rate of 98/hour in order for her actual pay to provide the minimum wage. However, most employees testified to rates falling only between 30 and 60 cards/hour.

A pattern of violations with regard to those not testifying can be inferred based on the representative testimony of these witnesses. Appendix B demonstrates similar unattainable rates of production for a sampling of 20 non-testifying employees. In fact, only two non-testifying witnesses in this random sample could have achieved the rate of production required to render her actual pay equal to the minimum wage (F. Hecht, at 45 cards/hour and M. Paolacci, at 25 cards/hour).

(4) *Calculation of Back Wages Due*

Continuing with the prior hypothetical home researcher, the next variable to be determined is the amount of back wages due. Once again, with an assumed rate of 50 cards/hour, Devins reasons that

$$\text{Back wages due} = \frac{(\text{cards received} \times \text{minimum wage}) - \text{actual pay}}{\text{cards/hour}}$$

$$= \frac{1359 \times \$3.10 - \$83.20}{50}$$

$$= 27.18 \times \$3.10 - \$83.20$$

$$= \$84.26 - \$83.20 = \$1.06$$

Therefore, the hypothetical employee *should* have received $84.26 at the minimum wage. Since the actual pay was only $83.20, a minimum wage violation of $1.06 occurred. Devins excluded this figure ("wage violation") from his computerized summary due to the missing data concerning the number of hours worked by each employee. He testified that once a number

of cards per hour is determined for an employee or a group of employees, that number would then be inserted into the computer in the cards/hour slot for a calculation of the back wages due in each work week.[12]

(5) *Calculation of Cards Received*

Another variable that confronted the Department of Labor was the determination of the total number of cards received when the only information available was the number of listed cards (*i.e.*, telephone numbers found) and the rate paid for these listed cards. To make this determination, Devins used data concerning the "find rates" for various rates of pay per card. For instance, 50-cent cards were found at a rate of 17.43%, 5-cent cards were found at a rate of 57.67%, and 10-cent cards were found at a rate of 37.18%. Armed with this data, Devins postulated that the number of cards received by a given researcher was algebraically ascertainable. Thus, he proposed the following formula:[13]

$$\frac{100\%}{\text{find rate}} = \frac{X}{\text{listed}}$$

For the hypothetical researcher:

$$\frac{100\%}{37.18\%} = \frac{X}{\text{listed}}$$

$$\frac{100\%}{37.18\%} = \frac{X}{416}$$

$$X = \frac{100\%}{37.18\%} \times 416$$

$$= 2.6 \times 416 = 1119$$

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[12] The witness performed similar mathematical calculations with respect to home researchers operating as distributees, for whom DialAmerica maintained no records. For this purpose, he utilized the records provided by several distributors.

[13] This formula is based upon the idea that the ratio of the "listed" to the unknown "received" is identical to the ratio of 100% to 37.18%. Tr. 641.

Therefore, the hypothetical researcher who has found listings for 416 cards payable at the 10-cent rate would have received 1119 cards.

(6) *Milo's Records*

To further complicate matters, in the case of a distributorship, the number of cards allotted to the distributor and his or her distributees may be the unknown. The records of distributor Thomas Milo, for instance, set forth the total number of cards received from DialAmerica and the amount paid to each of his distributees, but the number of cards worked on by each distributee is unknown. To solve for the number of cards received by each distributee as well as by the distributor, Devins proposes

$$\frac{\text{distributor's gross}}{\text{total gross}} = \frac{X}{\text{cards rec'd}}$$

For example, if Milo received a total of 1000 cards from DialAmerica, paid $12.45 to one distributee and $10.40 to himself, and the total gross pay was $23.35, then the formula would apply as follows:

$$\frac{10.40}{23.35} = \frac{X}{1000}$$

$$X = \frac{10.40}{23.35} \times 1000$$

$$= .445 \times 1000 = 445$$

The formula establishes that Milo received 445 cards out of the total 1000.

It once again becomes necessary to solve for the rate of cards per hour at which the minimum wage would be due to determine if a wage violation occurred. Devins proposes:

$$\text{cards/hour} = \frac{\text{minimum wage} \times \text{cards rec'd}}{\text{minimum wage due}}$$

$$= \frac{3.10 \times 445}{10.40} = 133$$

Milo would, therefore, have to process cards at a rate of 133/hour for his salary of $10.40 to reach the equivalent of minimum wage in the week in question.[14]

(7) *Poss' Records — Calculation of Rate of Pay Per Card*

In the case of the records maintained by distributor Christine Poss, Devins found that the rate of pay per card was not recorded. With actual pay received and the number of cards completed, actual pay must be divided by the number of cards completed to solve for the rate per card,that is:[15]

$$\text{rate per card} = \frac{\text{actual pay}}{\text{number of cards completed}}$$

Therefore, in a week in which a distributee is paid $54.90 for the completion of 366 cards,

$$\text{rate per card} = \frac{54.90}{366} = \$0.15$$

Here, in this example, the distributee was processing cards payable at the 15-cent rate.

(8) *Poss' Records — Number of Cards Received by Distributees*

Several of the records maintained by Poss indicate the rate of pay and exclude the number of cards received by a given distributee. To solve for cards received, the formula suggested is

$$\text{cards received} = \frac{\text{listed cards}}{\text{find rate}}$$

Therefore, if a distributee working on cards payable at a rate of 8 cents (as indicated by the records of Poss) found 195 numbers

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[14] Setting the minimum wage due equal to the actual amount received reveals the lowest number of cards/hour at which the minimum wage would have been paid.

[15] Tr. 696-97.

(*i.e.*, "listed" cards), and the find rate for 8-cent cards is 39.35%, then

$$\text{cards received} = \frac{195}{.3935} = 495$$

this employee would have received 495 cards.

A persistent and nagging question arose concerning the definition of a card "processed." It is the Department's position that the task of "processing" cards takes into account not simply time spent on the telephone, but includes the performance of whatever incidental tasks are necessary, such as unpacking and sorting cards by state.[16] Furthermore, Devins stated that a home researcher, in calculating the number of cards per hour that he or she is able to complete, would include cards passed over because the task of "processing" involves removing the cards from a package, and the determination that certain ones should not be researched.[17] Thus, the Department asserts that a card received *is* a card processed. If, however, it is found by the Court that hours worked includes only the time spent on the telephone, as DialAmerica contends, then Devins admits that his formula would have to be adjusted accordingly.[18]

Devins further testified that if a particular home researcher received 1,000 cards in a given week and neglected to so much as look at 900 of them, the Department would only consider 100 as the number of cards received or processed.[19] However, he added that if a worker at least looked through all of the remaining cards, the time so spent would be included in the calculation of "hours worked."[20]

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[16] Tr. 624.

[17] Devins' statement corroborated the testimony of most of the home researchers.

[18] Tr. 716.

[19] Tr. 730.

[20] Tr. 731.

Upon a thorough review of the deposition testimony of various home researchers, Devins noticed an obvious pattern of minimum wage violations across the board.[21] At a production rate of 60 cards per hour, he found that 91% of the 4,922 person-work weeks in 1982 would have resulted in minimum wage violations. At a production rate of 90 cards per hour, 53% of the person-work weeks resulted in minimum wage violations. Finally, at the rate of 50 cards per hour, *every* employee was subjected to a minimum wage violation.[22] From his investigation Devins concluded that the lowest rate of cards per hour at which the minimum wage violation would be eliminated for *every* employee would be 107.[23]

Finally, Devins concluded that there existed a pattern as to how the home researchers performed their work. Workers generally first sorted cards, then screened cards to determine which cards to call, made phone calls, and finally initialed each card. Although some worked 30 minutes at a time and some four hours at a time, Devins is convinced that once the researchers sat down to work, each one performed the same basic tasks in precisely the same manner.[24]

C. *Deposition Telephone Tests*

DialAmerica offered evidence of telephone tests initiated in conjunction with the depositions of several home researchers for this Court's consideration in determining whether there is a reasonable basis for finding a production rate for the testifying home researchers.

These tests, conducted by DialAmerica, required the deponents to research 20 cards by calling Directory Assistance and requesting telephone numbers as they had previously done in

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[21] Tr. 759.

[22] Tr. 760.

[23] Tr. 761.

[24] Tr. 771.

their homes. The deponents utilized a touch tone telephone set up at the offices of DialAmerica, and were required to dial "9" for an outside line, and "1" to begin dialing Directory Assistance outside of New Jersey.[25] The DialAmerica attorneys timed each deponent and subsequently made inquiries as to whether the test was representative of the manner in which he or she performed the work at home, whether the use of the automated response system today made the work go faster, and whether that system made it difficult to obtain more than one listing per directory assistance call.

Most deponents indicated that the process was much quicker at the deposition test, and many suggested that they could not have completed the number of cards per hour at home that were completed during DialAmerica's test.

Finally, the cards provided at the deposition test were from one state, whereas researchers, in reality, were given cards from a variety of states. Since many deponents testified that certain states were faster or slower than others, the critical question to ask is whether these tests provide an accurate representation of the probable production rates achieved at home.

Presumably, DialAmerica submitted evidence of its telephone tests in an effort to show that most of the home researchers had the ability to complete more cards than the records and their testimony indicate. If such a showing were in fact made and accepted, this Court could then determine that the minimum wage violations calculated by compliance officer Devins are grossly overstated and that the "pattern" of minimum wage violations is illusory at best.

This Court refuses, however, to ignore the pattern established by the testimony of so many home researchers and the records submitted in evidence. While it may be true that certain home researchers sporadically could have achieved higher rates of production, an assertion of what they "should" have done begs the question and in no way lessens the wage violations that have been committed by DialAmerica.

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[25] The deponents indicated that these steps were not necessary at the time of their home research in 1980-82.

D. *Bellcorp District Manager*

The Department of Labor called Donna Bastien of Bell Communications Research ("Bellcorp") as an expert witness. Bastien maintains the title of district manager for open network architecture and has previously been involved in the management of operator systems and technical studies and consultation in the area of Directory Assistance.[26]

Bastien offered testimony as to the average time spent by an operator on a Directory Assistance call between 1980 and 1982 using microfilm or microfiche Directory Assistance systems. This period, the "average work time," consists of the time that the customer is connected to the particular operator system and the operator is serving that customer.[27] In other words, its duration is measured from the time the operator system identified the operator to whom it would forward the call until the time that operator disconnected from the call.[28] Based on documents in evidence, it can be gleaned that in the early 1980s, the average work time for an operator using a computerized system was 30.5 seconds; for an operator using microfilm or microfiche, 33 seconds; and for an operator using a telephone book, 38 seconds in the early 1980's.[29]

In an attempt to demonstrate that the deposition telephone test of 1987 was not conducted under conditions sufficiently similar to those existing in 1980-83, the Department elicited testimony from Bastien as to the rate of growth of computerized Directory Assistance systems. In 1983, 79 computer systems and three microfilm systems were in existence for the Bell operating companies in the United States.[30] By contrast, in 1980, 35% of

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[26] Tr. 523-24.

[27] Tr. 529.

[28] Tr. 556.

[29] The witness testified that paper and microfilm systems are presently being phased out in favor of the computer, and that the data relied upon for the years 1980-83 may not be completely relevant to the year 1987. Tr. 536.

[30] Tr. 548.

Directory Assistance systems were using microfilm or microfiche, 14% were using paper records, and 51% were computerized. During her testimony, Bastien described how a call to Directory Assistance proceeds. Once a caller has dialed the appropriate number of digits (depending on which section of the country one is dialing from, this may be as few as three digits or as many as 10),[31] the call is routed through the telephone network by various "switching systems" and eventually terminates at an operator system. The system requires a certain amount of time in order to locate an available operator but, once found, the operator is attached to the call. When the caller makes an information request, the operator must search for the number or numbers using one of the search mechanisms (microfilm/microfiche, computerized database, or phone book). The operator then provides the number or numbers to the caller manually or by use of a computerized announcement machine (audio response system),[32] and then disconnects from the call.

In terms of the amount of time required to complete a Directory Assistance call, Bastien estimated one second per digit dialed using a rotary phone, and at least half of that time for a caller using a touch tone phone.[33] In addition, 140 milliseconds (.140 seconds) are required for the transmission of each digit dialed.[34] She further explained that there exists a hierarchy of switching machines (*i.e.*, classes) used in the telephone network, including the caller's local machine. A call could conceivably be routed through eight classes before obtaining a connection with an operator.[35] Thus, hypothetically, if a caller must dial an area code plus a seven-digit telephone number (*i.e.*, 10 digits in sum), and 140 milliseconds per digit is required, the call could be routed in 5.6 seconds.[36] Although the witness acknowledged that

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[31] Tr. 550.

[32] The automated response system, not in use until 1982, is one by which the requested telephone number is recited not by the operator manually, but by recording.

[33] Tr. 559-60.

[34] Tr. 561.

[35] Tr. 561-62.

[36] Tr. 563.

a shortage of operators or a heavy flow of traffic could cause a caller to wait longer than usual, the normal pre-divestiture procedure required a 5.8 second speed of answer time. In other words, 5.8 seconds was the normal time required to actually get connected to an operator.[37] Therefore, assuming 10 seconds for dialing (one second per digit for a 10 digit call), 5.6 seconds for the call to be routed, 5.8 seconds to get the operator, and approximately 30 seconds for average working time, the average Directory Assistance call could be completed in 51 seconds.[38] The average waiting time could, of course, be extended where the caller requested more than one telephone number from the operator. Before the telephone company began charging for Directory Assistance, there was more flexibility in the amount of requests it would tolerate. In light of the subsequent charge for Directory Assistance and the automated response mechanism, an operator could manually monitor the number of requests permitted.[39]

Assuming a slight overload of requests for Directory Assistance, the speed of answer would naturally be longer, according to Bastien. A 5% overload, for instance, would cause a 10-second delay at most. However, there is no direct proportion among these figures, as a 30% overload would not necessarily indicate a 60-second delay.

Finally Bastien concluded that the use of the automated response mechanism today requires a caller to spend more time to acquire two listings than the caller would have spent in the early 1980s. Thus, while automation may be less expensive to the telephone company, it is not necessarily quicker.[40]

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[37] This 5.8 second goal was reached 98% of the time in 1981, 99% of the time in 1982, and 99% of the time in 1983.

[38] Tr. 565.

[39] Another effect of the automated response is that it is not included in average working time. Thus, if an operator chooses to use the automated response rather than an oral response, the average working time is naturally diminished.

[40] Tr. 578.

This Court finds Bastien's testimony credible. Accounting for the dialing process, the routing process, the speed of answer time, and average work time, the Court is satisfied that 51 seconds to complete a Directory Assistance call is a reasonable approximation and entirely compatible with the Secretary's finding of 53 cards/hour as the average number processed by the typical home researcher.

IV. *DISCUSSION*

A. *Fair Labor Standards Act (FLSA)*

Pursuant to § 11(c) of the FLSA, 29 U.S.C. § 211(c), every employer is required to make, keep and preserve records of persons employed by it and of the wages, hours and other conditions and practices of employment maintained by it. This duty is imposed upon the employer as employees rarely maintain such records, and it is the employer who is in the position to know and produce the most probative facts regarding the nature and amount of work performed. *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687, 66 S. Ct. 1187 (1946).

The production records maintained by DialAmerica include name, date, number of cards received, number of cards for which listings were found, and amount paid. However, there is no record of the number of hours worked by the home researchers, and DialAmerica never required its home researchers to keep track of the number of hours worked. A violation of the record-keeping provisions of the FLSA is, therefore, patently obvious, as the number of hours worked is critical to a determination of the minimum wages due.

Section 6(a) of the Act requires an employer to pay each of its employees an amount not less than the applicable minimum wage times the number of hours worked. 29 U.S.C. § 206(a).[41] This work performance payment must be made on a weekly basis. In other words, each work week stands on its own and payments made in productive and unproductive weeks cannot

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[41] As already noted, in 1980 the minimum wage was $3.10/hour. Subsequently, the minimum wage was raised to $3.35/hour.

be averaged together for the purpose of a minimum wage determination.[42] Impliedly, therefore, the speed at which one works is not relevant to the calculation of minimum wage.[43]

The Department contends that the unknown number of hours actually worked by each home researcher can be reconstructed through a formula utilizing such known factors as minimum wage, cards received, and amount actually paid. The Department posits that the application of its theory of proof will permit this Court to ascertain a minimum wage violation for each work week by comparing the home researcher's rate of processing cards to the rate at which the researchers would have been required to process cards in order to earn the minimum wage.

An employee who brings suit under § 16(b) of the Act, 29 U.S.C. § 216, for the recovery of unpaid minimum wages must prove that he or she has performed work for which he or she was not properly compensated. *Anderson*, 328 U.S. at 687. "The remedial nature of this statute and the great public policy which it embodies, however, militate against making the burden an impossible hurdle for the employee." *Id.*

The *Anderson* case and its progeny establish that when the employer has complied with the Act and has maintained proper and adequate records, the burden of the employee is easily discharged by securing production of those records. *Id.* However, where, as in the case at bar, the employer's records are inaccurate or inadequate, and the employee alone is unable to offer convincing proof, a serious problem arises. The solution, however, is not to penalize the employee by denying recovery based on an inability to prove the extent of the undercompensated work. Such a result "would place a premium on an employer's failure to keep proper records in conformity with his statutory duty; it would allow the employer to keep the benefits of an employee's labors without paying due compensation as contemplated by the Fair Labor Standards Act." *Id.* The employee in a case such as this meets the required burden if he

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[42] Tr. 808, 816-17.

[43] Tr. 819.

or she can prove that work was performed for which the worker was not properly compensated *and if* he or she produces sufficient evidence to show the "amount and extent of that work *as a matter of just and reasonable inference.*" *Id.* (emphasis added); *see Brock v. Seto*, 790 F.2d 1446, 1448 (9th Cir. 1986); *Donovan v. New Floridian Hotel, Inc.*, 676 F.2d 468, 472 (11th Cir. 1982); *Marshall v. Van Matre*, 634 F.2d 1115, 1119 (8th Cir. 1980).

Once the employee has satisfied this standard, the burden shifts to the employer to produce evidence of work performed or to negate the reasonableness of the inference to be drawn from the employee's evidence. *Anderson*, 328 U.S. at 687-88. If the employer is unable to meet this burden, the Court may determine and award damages to the employee. *Id.* As the *Anderson* Court held:

> The employer cannot be heard to complain that the damages lack the exactness and precision of measurement that would be possible had he kept records in accordance with the requirements of § 11(c) of the Act. . . . The employer, having received the benefits of such work, cannot object to the payment for the work on the most accurate basis possible under the circumstances.

Id. at 688.

After an employee has proved that he or she has performed work for which lesser compensation was received than provided by law, the fact of damage is certain. The uncertainty arises in the determination of the precise amount of damages sustained due to the statutory violation by the employer. *Id.* In that case, "it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts." *Id.* (citing *Story Parchment Co. v. Paterson Co.*, 282 U.S. 555, 563, 51 S. Ct. 248 (19). "It is enough under these circumstances if there is a basis for a reasonable inference as to the extent of the damages." *Id.* (citing *Eastman Kodak Co. v. Southern Photo Co.*, 273 U.S. 359, 377-79, 47 S. Ct. 400 (1927); *Palmer v. Connecticut R. Co.*, 311 U.S. 544, 560-61, 61 S. Ct. 379 (1941).

In light of these principles, when the employee has satisfied the burden of proof, the district court must determine the award of damages. The Court is vested with a great deal of discretion in determining the most accurate amount to be awarded. *Brock v. Norman's Country Market, Inc.*, 835 F.2d 823, 828 (11th Cir. 1983). In many instances, when FLSA claims are made against employers, the records maintained as to each employee are inadequate or inaccurate. In such cases, the district court must look to the litigants for assistance.[**] *Id.* "It is for the trial judge to determine from all he has and sees the weight to be accorded the compliance officer's computations." *Id.* (citing *Hodgson v. American Concrete Construction Co., Inc.*, 471 F.2d 1183, 1186 (6th Cir. 1973)). Moreover, it is not imperative that every employee testify in order to make out a prima facie case of the number of hours worked as a matter of "just and reasonable inference," and the fact that several employees do not testify does not vitiate their claim. *Id.* (citing *Donovan v. New Floridian Hotel, Inc.*, 676 F.2d at 472.

It is incumbent upon this Court to weigh the evidence before it, including the testimony of some 43 home researchers, for the purpose of determining whether a minimum wage violation exists and, if so, whether back wages may be awarded to the testifying, as well as the non-testifying, home researchers formerly employed by DialAmerica.

B. *Representative Testimony*

A critical issue in this case concerns the use of representative testimony to establish minimum wage violations for approximately 350 non-testifying employees.

In support of its contention that representative testimony cannot be utilized in this case, DialAmerica points to three situations in which such testimony has been accepted:

[**] Brock, in fact, offered the testimony of a compliance officer to assist the Court.

> In one such class of cases there is *substantial other evidence* to support the inference drawn from the representative testimony. . . . In each of these cases, evidence in addition to representative testimony was submitted and relied upon by the court in reaching reasonable inferences of FLSA violations and awarding just, though approximate, damages to nontestifying as well as testifying employees.
>
> A second class of cases . . . involve[s] an employer *systematically causing records to be falsified* that would otherwise be properly maintained.
>
> Finally, another class of cases in which reasonable inferences may be drawn from representative testimony involves the establishment by the Department of a *uniform pattern or practice of work methods*, conditions, and hours encompassing a class of employees.

Defendant's Proposed Findings of Fact and Conclusions of Law, at 9-10 (emphasis added) (citing *Brock v. DialAmerica Marketing, Inc.*, Civil Action No. 81-4020 (D.N.J. Oct. 15, 1986), slip op. at 4-6).

DialAmerica recognizes that the Department may present representative testimony in any of these three situations to allow the Court to draw inferences regarding the work habits of *all* former home researchers, both testifying and non-testifying. However, DialAmerica points out the Court's word of caution:

> . . . the Department should realize DialAmerica will have an opportunity to rebut the reasonableness of such inferences. If DialAmerica presents evidence to rebut the reasonableness of an inference that the work habits of the testifying employees are representative of the work habits of nontestifying employees, this Court will not be able to find FLSA violations or award damages to non-testifying employees. Thus, if DialAmerica rebuts the Department's representative testimony, only testifying employees who establish FLSA violations will be able to recover damages.

Defendant's Proposed Findings of Fact and Conclusions of Law, at 11 (citing *Brock v. DialAmerica*, slip op. at 6).

Despite such warning, DialAmerica contends that the Department has failed to demonstrate a representative pattern among the home researchers and that, in fact, the unique manner in which each worker performed his or her work precludes the use of representative testimony in the home worker scenario.

This Court, however, finds that the Department has successfully demonstrated patterns among home researchers through the testimony of a number of home researchers. The basic research task, for instance, can be performed, and has likewise been described, in only one manner: dial the operator, request a telephone number, record the number, and initial the card.[45] Moreover, every researcher was required to use the Directory Assistance services of the telephone company, and all were uniformly subjected to its limitations in speed of transport of a call, speed of dialing, waiting time for the connection to an operator, and limitations upon the number of listings to be provided by the operator.[46] Thus, although individuals may have chosen to do their research at different times of the day and did not work in each other's presence or under the supervision of DialAmerica, their basic research task was straightforward and uniform.

In addition to the appearance of work patterns, this Court perceives an unrebutted pattern of minimum wage violations by DialAmerica. The law permits reliance upon representative testimony to support the discovery of minimum wage violations and the award of back wages under the FLSA to non-testifying as well as testifying employees. *Brock v. Tony & Susan Alamo Foundation*, 842 F.2d 1018, 1019-20 (8th Cir. 1988); *Donovan v. New Floridan Hotel, Inc.*, 676 F.2d at 471-73.

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[45] While the use of telephone books was mentioned, this was not a common method of research.

[46] Plaintiff's Proposed Findings of Fact and Conclusions of Law, at 70.

The district court must "estimate and fashion a reasonable remedy that restores as fully as possible all of the employees covered by the FLSA who were improperly denied compensation" even where the records are deficient. *Brock v. Tony & Susan Alamo*, 842 F.2d at 1019. In that case the court declared that the exact form of remedy is left to the district court, but "to compensate only those employees who chose or were chosen to testify is inadequate in light of the finding that other employees were improperly denied compensation." *Id.* at 1019-20.

The testimony of 43 witnesses, both at trial and by deposition, confirms the existence of minimum wage violations for *every* home researcher employed by DialAmerica between 1980 and 1982. The sheer commonality of their testimony breathes credibility into the claims of the testifying home researchers, and permits this Court to feel comfortable in drawing inferences therefrom.

The majority of those who testified claimed that they were able to process cards at rates falling between 30 and 60 per hour. The average rate for all employees was 53 cards/hour, a number derived by averaging the midpoint rates for all testifying witnesses (Appendix C). Based on the testimony given, this Court finds that the work habits of non-testifying witnesses were sufficiently similar to testifying witnesses. Such a finding allows for a determination of the number of hours worked by those not testifying as a matter of "just and reasonable inference." *Anderson*, 328 U.S. at 687; *Donovan*, 676 F.2d at 472.

This Court's decision that non-testifying employees are entitled to an award of back wages finds support not only in the testimony of former home researchers, but in the testimony of Compliance Specialist William Devins. Other courts have expressed acceptance of the admissibility of both the testimony and calculations of compliance officers as they pertain to minimum wages due. *Brock v. Seto*, 790 F.2d 1446, 1449 (9th Cir. 1986); *Hodgson v. Humphries*, 454 F.2d 1279, 1282-83 (10th Cir. 1972); *Hodgson v. American Concrete Construction Co. Inc.*, 471 F.2d 1183, 1186 (6th Cir.), *cert. denied*, 412 U.S. 949,

93 S. Ct. 3007 (1973) ("where, as here, the [compliance officer's] computations of overtime pay were based in part on employer records, those computations were improperly excluded").

In the present scenario, the testimony of Devins constitutes the "substantial other evidence" based upon which this Court may reasonably infer FLSA violations and award damages to non-testifying employees, although the result may be less than precise in its measurement.

The mathematical analysis undertaken by Devins was substantially based upon the business records of DialAmerica and demonstrates in great detail the total extent of DialAmerica's minimum wage violations.[47] Of utmost significance is the proposed formula for the calculation of back wages due. This Court accepts the proposed theory that a card received and sorted is a card processed, and therefore finds Devins' formula to be the most promising for the onerous calculation of back wages due. For each employee in each week, Devins is able to determine whether, based on an assigned rate of cards/hour,[48] number of cards received, and actual pay, a particular employee received the appropriate minimum wage each week.

This Court believes that the assignment of the 53 cards/hour average to each employee will yield the most equitable result in determining the amount of back wages to be awarded to—both testifying and non-testifying home researchers. Because DialAmerica has failed to maintain the appropriate records in accordance with the FLSA, it cannot now complain that the damages are inaccurate or inappropriate. *Anderson*, 328 U.S. at 688. Had DialAmerica maintained the proper records, a more precise amount could have been awarded.

Moreover, DialAmerica has failed to rebut the reasonableness of the inferences drawn from the representative testimony presented. The evidence of its deposition telephone test is unconvincing. The test does not represent a realistic reconstruction

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[47] Devins' complete calculations and the reasons therefor were previously discussed in detail in *supra* Part III(A) & (B).

[48] Cards/hour was an unknown figure supplied by the testimony of former home researchers. On average, home researchers were able to research 53 cards per hour.

of the conditions under which the home researchers worked in 1980-82, and thus cannot be used to rebut the testimonial recall of the witnesses. The testimony of its own witnesses,[49] in fact, corroborates the pervasive pattern of minimum wage violations. Although production rates may vary among researchers, this discrepancy is an insufficient basis upon which to deny recovery for employees who establish undercompensation pursuant to the FLSA.

Since an average rate of 53 cards/hour has been ascertained, that average figure may be utilized in conjunction with the formula proposed by Devins for the purpose of determining cards/hour and, thereby, back wages due.

V. *REMEDIAL ACTION*

A. *Injunction*

The Department of Labor seeks an injunction restraining future violations of the minimum wage and record-keeping provisions of the FLSA. Injunctions are frequently granted in cases of this nature "because of the significant public interest affected by violations of the FLSA" and because an injunction relieves the Secretary of the burden of administering and enforcing the FLSA. *Marshall v R&M Erectors, Inc.*, 429 F. Supp. 771, 782 (D. Del. 1977); *see Bay Ridge Co. v. Aaron*, 334 U.S. 446, 460, 68 S. Ct. 1186, 1194 (1984); *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288 (1960); *Schultz v. Wheaton Glass Co.*, 319 F. Supp. 229, 232 (D.N.J. 1970), *aff'd*, 446 F.2d 527 (3d Cir. 1971).

Moreover, the issuance of a permanent injunction in this case would not subject the employer to a penalty or hardship as it merely requires the employer to comply with the law. *See Marshall*, 429 F. Supp. at 782.

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[49] Employees testifying at trial on behalf of DialAmerica include Poss, Catrambone, K. Davis, S. Davis, Epstein, Milo, Antonacci, Catannia and Rizzo.

The crucial question in ascertaining the suitability of injunctive relief is whether the risk that the defendant will fail to keep appropriate employee records or to pay the proper minimum wage is substantial enough to warrant such a remedy. *Id.* Although DialAmerica has in fact discontinued its home researcher program, it has not abandoned its business completely, and the risk is, therefore, ever present that it will resume the home researcher program at improper rates of pay. Furthermore, without the benefit of an injunction to restrain DialAmerica from further withholding wages, employees granted the right to receive back wages will have no means by which to enforce that right. *Wirtz v. Melthor, Inc.*, 391 F.2d 1, 3 (9th Cir. 1968).

In light of these principles, this Court will, therefore, grant the requested injunction to prevent the future violation by DialAmerica of the FLSA minimum wage and recordkeeping provisions.

B. *Back Wages*

The precise amount of damages to be awarded each home researcher is to be determined on the basis of the formulae presented at trial and the records provided to the court by both DialAmerica and its former employees. This Court finds that the use of the average production rate of 53 cards/hour for *all* employees will allow for the most equitable determination of back wages due. As stated previously, had DialAmerica maintained proper records of the hours worked by its employees, a precise calculation of back wages due would have been feasible. However, the unavailability of such data leads this Court to the conclusion that the application of the average production rate (53 cards/hour) will provide the most reasonable approximation.

C. *Pre-Judgment Interest*

The Third Circuit's recognition of a presumption in favor of pre-judgment interest requires this Court to apply that presumption in the present matter. *Brock v. Richardson*, 812 F.2d 121, 126-27 (3d Cir. 1987). In fact, many of the appellate courts

considering this issue have held that pre-judgment interest for back pay awards under the FLSA is mandatory or should be presumed appropriate. *Id.* at 126 (citing *Associated Drugs, Inc.*, 538 F.2d 1191, 1194 (5th Cir. 1976); *Ford v. Alfaro*, 785 F.2d 835, 842 (9th Cir. 1986)).

CONCLUSION

A thorough review of the record leads this Court to the following conclusions:

1. DialAmerica has violated both the record-keeping and minimum wage provisions of the FLSA, 29 U.S.C. § 211(c) and § 206(a), by failing to record the hours worked and by undercompensating its employees for work performed.

2. A pattern of minimum wage violations encompassing non-testifying employees has been established through the representative testimony of 43 former home researchers. DialAmerica has failed to rebut the existence of this pervasive pattern.

3. The formulae proposed by the compliance specialist are sufficient to enable a calculation of back wages due *every* former home researcher based on an average rate of 53 cards/hour.

4. Pre-judgment interest will be appropriately awarded to each home researcher receiving back wages.

5. An injunction against future violations of the minimum wage and record-keeping provisions of the FLSA is appropriate.

6. Finally, this Court, understanding that further action will be required to implement its decision, directs that all further applications be referred to the Magistrate.

Dated: March 23, 1989

/s/Alfred M. Wolin

ALFRED M. WOLIN, U.S.D.J.

APPENDIX A

Testifying Witneses
(excluding distributees)

(Number of cards to be processed in order for actual pay to equal minimum wage)

Name	Date	Min. Wage	Rec'd	Lstd.	Rate	Actual Pay	MW Viol. Below Indicated Cds/Hr.
R. Herdman (D)	1/8/80	3.0	3344	1854	0	103.32	97
C. Piper	4/6/81	3.35	510	114	.40	45.60	37*
R. Sarfatty	1/9/80	3.10	1517	455	.20	91.00	52*
Y. Curcio	5/1/81	3.35	725	277	.10	27.70	88
J. Klee	11/12/81	3.35	520	193	.10	19.30	90
R. Martin	9/29/80	3.10	500	215	.10	21.50	72
V. Puletti	1/17/80	3.10	235	104	.05	5.20	140
L. Hroncich	9/24/80	3.10	591	194	.10	19.40	94
D. Roper	9/23/81	3.35	526	307	.10	30.70	57
M. Sullivan	4/20/81	3.35	545	187	.10	18.70	98
B. Sticco	1/7/80	3.10	1789	400	.05	20.00	277
J. Carlson	1/3/80	3.10	1456	601	.05	30.05	150
T. Shikarides	8/4/80	3.10	813	275	.10	27.50	92
S. Labenda	1/8/80	3.10	1600	390	.05	19.50	254

* See Opinion at 14, footnote 11.

Name	Date	Min. Wage	Rec'd	Lstd.	Rate	Actual Pay	MW Viol. Below Indicated Cds/Hr.
C. Poss (D)	1/2/80	3.10	4333	1557	.20	311.40	43*
R. Catrambone (D)	1/21/80	3.10	2525	915	.10	91.50	86
T. Milo (D)	1/3/80	3.10	1000	467	.05	23.35	133
D. Antonaccia	1/4/80	3.10	1000	617	.05	30.85	100
A. Rizzo	1/9/80	3.10	250	197	.05	9.85	79
L. Bauer	1/2/80	3.10	750	427	.05	21.35	109
G. Buckalew	1/22/80	3.10	1065	700	.05	35.00	94
D. Connas	11/16/81	3.35	1500	639	.10	63.90	79
S. Conway	3/13/80	3.10	959	731	.05	36.55	81
M. DeNorchia	11/6/80	3.10	615	286	.10	28.60	67
C. Florio	1/3/80	3.10	750	459	.05	22.95	101
S. Gould	8/1/80	3.10	594	180	.07	12.60	146
N. Locurcio	6/12/80	3.10	555	214	.07	13.98	115
A. Mahaffey	4/3/81	3.35	500	22	.40	8.80	190
W. Mowery	1/9/80	3.10	13422	7504	.05	450.24	92
M. Nisenson	4/30/81	3.35	800	436	.10	43.60	61
S. Isuadacz	10/31/81	3.35	532	247	.10	24.70	72
J. Spielman	4/22/81	3.35	503	83	.10	8.30	203
D. Washington	1/8/80	3.10	846	74	.20	14.80	177

* See Opinion at 14, footnote 11.

APPENDIX B

Sample of 20 Non-Testifying Witnesses

Name	Date	Min. Wage	Rec'd	Lstd.	Rate	Actual Pay	MW Viol. Below Indicated Cds/Hr.
A. Aubry	6/12/80	3.10	406	199	.07	13.93	90
A. Barnes	7/13/81	3.35	597	234	.10	23.40	85
F. Casella	1/6/81	3.35	681	185	.10	18.50	123
C. Dietze	6/12/80	3.10	500	111	.07	7.77	199
M. Hayden	12/9/81	3.35	515	210	.10	21.00	82
F. Hecht	7/1/81	3.35	490	368	.10	36.80	45*
D. Imbriale	4/28/81	3.35	595	281	.10	28.10	71
I. Kelly	1/16/80	3.10	1523	464	.05	23.20	204
D. Lynn	1/30/80	3.10	450	37	.20	7.40	189
M. Paolacci	4/6/81	3.35	501	169	.40	67.60	25*
I. Rodriguez	2/2/81	3.35	589	279	.10	27.90	71
J. Romagnino	5/6/81	3.35	539	261	.10	26.10	69
B. Sanford	1/15/82	3.35	534	242	.10	24.20	74
P. Savas	6/26/81	3.35	526	182	.10	18.20	97
T. Tatulli	11/9/81	3.35	538	223	.10	22.30	81
T. Volmar	1/8/80	3.10	671	169	.05	8.45	246
M. Roberts	2/14/81	3.35	525	241	.10	24.10	73
M. Tasman	6/30/80	3.10	39	14	.07	.98	123
J. Koeller	7/1/81	3.35	507	196	.10	19.60	87
C. Tintle	3/21/80	3.10	600	342	.05	17.10	109

* See Opinion at 14.

APPENDIX C*

Pattern of Average Cards Processed Per Hour

The following chart sets forth the range of average cards processed per hour by each witness.

	Low	High	Midpoint
Mahaffey	16	20	18
Osiadacz	20	39	29.5
Comas	20	33	26.5
Sullivan	25	30	27.5
Beatty	25	25	25
Florio	25	30	27.5
Washington	29	38	33.5
Sticco	30	30	30
Walsh	30	30	30
Rubino	33	40	36.5
Bauer	33	33	33
Hroncich	33	42	37.5
Buckalew	33	63	48
Gould	36	50	43
Cornelius	40	50	45
Shikarides	40	50	45

* See opinion at 36.

APPENDIX C (Continued)

	Low	High	Midpoint
Roper	40	50	45
Mowery	40	40	40
LaBenda	40	90	65
Locurcio	42	50	46
Suzdak	45	50	47.5
Herdman	50	50	50
Piper	50	68	59
Sarfatty	50	63	56.5
Curcio	50	50	50
Poss	50	100	75
Catrambone	50	100	75
K. Davis	50	50	50
S. Davis	50	50	50
Mammolitti	50	63	56.5
DeNorchia	52	55	53.5
Parsells	56	63	59.5
Conway	60	60	60
Epstein	60	60	60
Martin	60	70	65
Puletti	60	80	70

	Low	High	Midpoint
Carlson	60	80	70
Klee	63	83	73
Milo	70	70	70
Nisenson	73	73	73
Antonacci	83	100	91.5
Spielman	83	83	83
Catannia	90	100	95
Rizzo	100	100	100

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

ANN McLAUGHLIN, Secretary of Labor, U.S. Department of Labor, Plaintiff,	Civil Action No. 81-4020
v.	ORDER
DIALAMERICA MARKETING, INC., Defendant.	

For the reasons set forth in the opinion of this Court issued herewith,

It is on this 23rd day of March, 1989,

ORDERED that DialAmerica pay back wages to all former home researchers employed between 1980 and 1982, at amounts to be calculated based upon the records of DialAmerica and the formulae developed at trial; and it is further

ORDERED that the back wages due be determined based upon the average production rate of 53 cards/hour; and it is further

ORDERED that pre-judgment interest be awarded in conjunction with the award of back wages; and it is further

ORDERED that DialAmerica is enjoined from committing further violations of the minimum wage and record-keeping provisions of the FLSA, 29 U.S.C. § 206(a) and § 211(c); and it is further

ORDERED that all further applications concerning the implementation of this decision are to be referred to the Magistrate.

/s/Alfred M. Wolin
ALFRED M. WOLIN, U.S.D.J.

		UNITED STATES DISTRICT COURT DISTRICT OF NEW JERSEY
ELIZABETH DOLE, Secretary of Labor, United States Department of Labor,	:	Civil Action No. 81-4020 (Hon. Alfred M. Wolin)
Plaintiff,	:	
v.	:	FINAL JUDGMENT
DIALAMERICA MARKETING, INC.,	:	
Defendant.	:	

This matter having come before the Court for trial and for supplemental proceedings before United States Magistrate G. Donald Haneke; and the Court having received and considered the September 7, 1990 Report and Recommendation of the Magistrate; and the Court having received and considered all of the various objections to the Report and Recommendation; and the Court having considered the matters discussed in the Report and Recommendation *de novo* and being persuaded that the objections are not well-founded: and good cause appearing,

It is on this 28th day of September, 1990, ORDERED AND ADJUDGED:

1) The Report and Recommendation of September 7, 1990 is hereby adopted as this Court's opinion;

2) Judgment is hereby entered in favor of the plaintiff and against the defendant in the sum of $154,413.73 to be allocated in accord with plaintiff's Schedules A, B and C;

3) The defendant shall pay postjudgment interest at the rate specified by 28 U.S.C. § 1961 from date of entry of judgment until date of judgment payment;

4) The defendant shall pay prejudgment interest at the rate specified by 26 U.S.C. § 6621 from the January 1, 1981 median point of violation accrual until the date of entry of judgment;

5) The defendant shall be required to cooperate with whatever reasonable discovery efforts are necessary to aid in the execution of this judgment;

6) The defendant shall be permanently enjoined from committing any further violations of the minimum wage and recordkeeping provisions of 29 U.S.C. § 206(a) and 211(c);

7) The taxation of all costs shall be assessed against the defendant;

8) Either party may make appropriate application before the Magistrate to apply a specific statute to the dispersal of the judgment funds if the Department has not located all awardees within three years of when judgment funds become due and payable;

9) The Department shall make all reasonable efforts to locate the awardees within three years time of when judgment funds become due and payable and shall inform the Court and the defendant at the expiration of such time if any funds remain to be dispersed; and

10) If any further detail of a ministerial nature occurs in relation to entry of judgment in this case, such matters shall be brought before the Magistrate.

/s/ Alfred M. Wolin

ALFRED M. WOLIN
UNITED STATES DISTRICT JUDGE

The Pattern of Average Cards Processed Per Hour

204. The following chart sets forth the range of average cards processed per hour by each witness.[11]

	LOW	HIGH[12]	MIDPOINT[13]
Mahaffey - 3	16	20	18
Osiadacz - 3	20	39	29.5
Comas - 3	20	33	26.5
Sullivan - 1	25	30	27.5
Beatty - 3	25	25	25
Florio -3	25	30	27.5
Washington - 3	29	38	33.5
Sticco - 1	30	30	30
Walsh - 3	30	30	30
Rubino - 3	33	40	36.5
Bauer - 3	33	33	33
Hroncich - 1	33	42	37.5
Buckalew - 3	33	63	48
Gould - 3	36	50	43
Cornelius - 3	40	50	45
Shikarides - 1	40	50	45
Roper - 1	40	50	45
Mowery - 3	40	40	40
LaBenda - 1	40	90	65
Locurcio - 3	42	50	46
Sudzak - 1	45	50	47.5

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[11] "1" next to the witness' name denotes that the person was plaintiff's witness at trial. "2" denotes defendant's trial witness. "3" denotes that the witness testified through deposition, not at trial; and the deposition transcript of this witness is an exhibit of record.

[12] The numbers in this column exclude the highest cards per hour rates that the witnesses testified they reached only a few times and were the exception during their entire employment.

[13] The midpoint is the average of the low and high averages.

Herdman - 1	50	50	50
Piper - 1	50	68	59
Sarfatty - 1	50	63	56.5
Curcio - 1	50	50	50
Poss - 2	50	100	75
Catrambone - 2	50	100	75
K. Davis - 2	50	50	50
S. Davis - 2	50	50	50
Mammolitti - 3	50	63	56.5
DeNorchia - 3	52	55	53.5
Parsells - 3	56	63	59.5
Conway - 3	60	60	60
Epstein - 2	60	60	60
Martin - 1	60	70	65
Puletti - 1	60	80	70
Carlson - 1	60	80	70
Klee - 1	63	83	73
Milo - 2	70	70	70
Nisenson - 3	73	73	73
Antonacci - 2	83	100	91.5
Spielman - 3	83	83	83
Catannia - 2	90	100	95
Rizzo - 2	100	100	100

(2)

No. 91-362

In the Supreme Court of the United States

OCTOBER TERM, 1991

DIALAMERICA MARKETING, INC., PETITIONER

v.

LYNN MARTIN, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the district court erred in awarding back-pay for minimum wage violations to approximately 400 home workers performing the same job based on the representative testimony of 43 of the workers concerning their average production rates.

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OCTOBER TERM, 1991

No. 91-362

DIALAMERICA MARKETING, INC., PETITIONER

v.

LYNN MARTIN, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals summarily affirming the district court's judgment (Pet. App. A1) is unreported. The opinion of the district court (Pet. App. A3-A39) is reported at 716 F. Supp. 812.

JURISDICTION

The judgment of the court of appeals was entered on May 30, 1991. A petition for rehearing was denied on June 26, 1991. Pet. App. A2. The petition for a writ of certiorari was filed on August 29, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a corporation engaged in telephone marketing. Pet. App. A4. Between 1976 and 1982, petitioner employed "home researchers" to locate the telephone numbers of magazine subscribers whose subscriptions were about to expire. *Id.* at A4-A5. Researchers would travel to petitioner's office where they were given a box or boxes of cards listing the names and addresses of magazine subscribers. *Id.* at A5. The researchers attempted to locate each subscriber's telephone number, primarily through the use of directory assistance. *Id.* at A5, A28. The researchers were paid on a piecework basis: they received a flat rate for each telephone number located. *Id.* at A6. Petitioner did not require the researchers to work a maximum or minimum number of hours or to complete a specified number of cards (although researchers could not pick up a new group of cards until all cards in their possession had been processed), and "[e]ach home researcher tailored his or her home research to fit his or her individual needs and life styles." *Id.* at A5-A6.

Petitioner maintained records for each home researcher, listing for each week the number of cards the home researcher received, the number of cards for which the researcher found telephone numbers, the applicable piece rate, and the total amount petitioner paid the researcher. Pet. App. A6-A7. Petitioner kept no record of the number of hours worked by the researchers and did not require them to keep track of their hours. *Id.* at A7.

2. The Secretary of Labor brought this action alleging that petitioner's pay practices with respect to the home researchers violated the minimum wage and recordkeeping provisions of the Fair Labor Standards

Act (FLSA), 29 U.S.C. 201 *et seq.* Pet. App. A4. After a trial, the district court held that petitioner committed a "patently obvious" violation of FLSA recordkeeping requirements because it neither recorded the number of hours worked by the home researchers nor required the workers to do so. *Id.* at A23. See 29 U.S.C. 211(c); 29 C.F.R. 516.2. Petitioner has not challenged that ruling, either before this Court or in the court of appeals.[1]

As to the allegations of minimum wage violations, the inquiry at trial focused on determining the home researchers' production rate—that is, the number of cards reviewed or completed per hour. The employer's records revealed the total number of cards reviewed weekly by each employee, and the total amount paid to each, but not the hourly wage. Determination

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[1] This suit originally encompassed two groups of workers, home researchers and "distributors." Distributors distributed cards to certain home researchers ("distributees") who could not or would not travel to petitioner's office. Petitioner paid the distributors one cent above the piece rate and issued one check for the gross amount of all telephone numbers located by their distributees. See Pet. App. A6; *Donovan* v. *Dial-America Marketing, Inc.* (*DialAmerica I*), 757 F.2d 1376, 1386 & n.13 (3d Cir.), cert. denied, 474 U.S. 919 (1985). Initially, the district court ruled that both home researchers and distributors were independent contractors and not employees covered by the FLSA, and dismissed this action in its entirety. On the Secretary's appeal, the court of appeals agreed with the district court that the distributors were independent contractors, but held that the home researchers were employees. *DialAmerica I*, 757 F.2d at 1379. This Court denied certiorari on the latter question. 474 U.S. 919. On remand from the court of appeals, the district court then determined that petitioner had not complied with the minimum wage requirements of the FLSA for the home researchers, and the court of appeals affirmed.

of the production rate, as applied to the total number of cards processed, would permit an estimate of the total number of hours worked by the researchers, from which it was possible to calculate the hourly wage the workers were actually paid. Pet. App. A10-A14.

In an effort to estimate the workers' rate of production, the district court heard the testimony of 43 former home researchers. Twenty-four appeared as trial witnesses and the depositions of 19 others were entered into evidence. Pet. App. A8. The home researchers testified as to the nature of their work and the number of hours it took them to complete a given number of cards. *Id.* at A8-A9. In addition, an expert witness testified as to the time needed to process the cards and procure telephone numbers by various methods, *id.* at A20-A23, and a Department of Labor compliance officer suggested formulas that would aid the court in determining the workers' production rates. *Id.* at A10-A17, A29-A30.

The court began its analysis of the evidence by noting that the burden is on the plaintiff to establish that an employee has performed work for which he was not properly compensated. Pet. App. A24. The court explained, however, that under *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946), if an employer fails to maintain records mandated by the FLSA, an employee "meets the required burden if he or she can prove that work was performed for which the worker was not properly compensated and if he or she produces sufficient evidence to show the 'amount and extent of that work as a matter of just and reasonable inference.'" Pet. App. A24-A25 (emphasis omitted), quoting *Mt. Clemens*, 328 U.S. at 687. The burden then shifts to

the employer to "produce evidence of work performed or to negate the reasonableness of the inference to be drawn from the employee's evidence." Pet. App. A25.

The court further observed that, under *Mt. Clemens*, once an employee has proved the existence of minimum wage violations, the uncertainty created by the absence of records should not bar a reasonable assessment of damages. The court observed that courts have a great deal of discretion in estimating the "approximate" amount to be awarded, see *Mt. Clemens*, 328 U.S. at 688, and can determine damages "as a matter of 'just and reasonable inference' " without hearing testimony from all employees. Pet. App. A26.

Applying these principles, the district court held that the Secretary had established a pattern of "pronounced" minimum wage violations for all home researchers, including those who had not testified at trial or by deposition. Pet. App. A4. The court found it reasonable to conclude that the work patterns established through the testimony of the 43 workers were fairly representative of the approximately 350 non-testifying researchers. The court observed that, although the home researchers worked at different times of the day and without supervision, "their basic research task was straightforward and uniform." *Id.* at A28. The court further noted that "[t]he sheer commonality of their testimony breathes credibility into the claims of the testifying home researchers, and permits this Court to feel comfortable in drawing inferences therefrom." *Id.* at A29. Relying on the patterns established by the testimony, the court found that "[t]he average rate for all employees was 53 cards/hour, a number derived by averaging the midpoint rates [itself an average of the low and high

numbers testified to] for all testifying witnesses." *Ibid.* Applying this production rate, it was possible to estimate the hours worked by each employee to complete the total number of cards processed, *id.* at A29-A30, and to calculate the pay each received for each estimated hour of work. Because the estimated hourly rate paid to each worker fell below the minimum wage, the court concluded that petitioner violated the minimum wage law "for *every* home researcher." *Id.* at A29; see also *id.* at A5 n.5, A13.[2]

The court held that DialAmerica's evidence failed to rebut the Secretary's showing of violations. Pet. App. A19, A3-A31. The company submitted a telephone test that it had administered to deponent home researchers, which purportedly showed that the production (cards/hour) rate was much higher than that alleged by the Secretary. *Id.* at A18. The court deemed the test "unconvincing," *id.* at A30, based on testimony by the home researchers that the test did not reproduce the conditions under which they actu-

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[2] In addition, the court found (Pet. App. A29-A30) that the Department of Labor compliance officer's testimony, which was largely based on petitioner's own records, constituted "substantial other evidence" supporting its determination that the testimony of the 43 home researchers established a pattern of minimum wage violations for the entire group of home researchers. The compliance officer testified that "[a]t a production rate of 60 cards per hour * * * 91% of the 4,922 person-work weeks in 1982 would have resulted in minimum wage violations." *Id.* at A18. At a production rate of 50 cards per hour, "*every* employee was subjected to a minimum wage violation" during that period. *Ibid.* (emphasis in original). Even at a rate of 90 cards per hour—a rate much higher than the estimated production average of 53 cards per hour, and one that was achieved by only three researchers—"53% of the person-work weeks resulted in minimum wage violations." *Ibid.*

ally worked. The court also found that petitioner's evidence was outweighed by the "pattern established by the testimony of so many home researchers and the records submitted in evidence." *Id.* at A19, A30-A31. In sum, the court concluded that the Secretary had demonstrated "an unrebutted pattern of minimum wage violations by DialAmerica" as to its home researchers. *Id.* at A28.

Finally, the court concluded that the "assignment of the 53 cards/hour average to each employee will yield the most equitable result in determining the amount of back wages to be awarded to both testifying and non-testifying home researchers." Pet. App. A30. The court therefore ordered the payment of back wages based on the 53 cards/hour production rate, and directed the parties to apply to a magistrate for implementation of the decision. *Id.* at A31-A33.

The magistrate recommended that the district court accept the Secretary's calculations of back wages due in the amount of $154,413.73, with prejudgment interest.[3] The district court entered a final judgment adopting the magistrate's recommendations. Pet. App. A41-A42. The court of appeals affirmed without opinion. *Id.* at A1.

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[3] This aggregate amount was obtained by adding together the amount of backpay due each home researcher, which was calculated by multiplying the difference between the minimum wage rate and the sub-minimum wage that each worker was estimated to have received, see pp. 5-6, *supra*, times the estimated number of hours worked (based on the 53 cards/hour production rate and the number of cards the worker processed). See Pet. App. A10-A14; A32, A34-A36.

ARGUMENT

Contrary to petitioner's assertion (Pet. 6), the court of appeals' ruling is not in conflict with the decision of this or any other court, and is correct as a matter of fact and law. Further review is unwarranted.

1. The decision does not contravene this Court's decision in *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946); rather, it is fully consistent with it. In *Mt. Clemens*, the Court held that an employee claiming a minimum wage violation need not "prove the precise extent of uncompensated work" where his inability to do so is the result of an employer's failure to maintain records required by the FLSA. Rather, the employee "has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated" and then produces "sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference." 328 U.S. at 687.

Under cases applying *Mt. Clemens*, the district court was correct to rely on representative testimony, in the absence of adequate recordkeeping, to determine the pattern and degree of wage violations. "Courts have frequently granted back wages under the FLSA to non-testifying employees based upon the representative testimony of a small percentage of the employees * * *. The requirement is only that the testimony be fairly representational." *Donovan* v. *Bel-Loc Diner, Inc.*, 780 F.2d 1113, 1116 (4th Cir. 1985); see also *Donovan* v. *New Floridian Hotel, Inc.*, 676 F.2d 468, 472 (11th Cir. 1982) ("it is clear that each employee need not testify in order to make out a prima facie case of the number of hours worked as a matter of 'just and reasonable inference'"); ac-

cord, *McLaughlin* v. *Ho Fat Seto*, 850 F.2d 586, 589 (9th Cir. 1988), cert. denied, 488 U.S. 1040 (1989); *Donovan* v. *Simmons Petroleum Corp.*, 725 F.2d 83, 86 (10th Cir. 1983); *Brennan* v. *General Motors Acceptance Corp.*, 482 F.2d 825, 829 (5th Cir. 1973).[4] The use of representative testimony is fully in keeping with the *Mt. Clemens* decision: As the Court pointed out, barring recovery in the absence of precise proof of the exact amount of undercompensation would "place a premium on an employer's failure to keep proper records" and "penalize the employee" by allowing the employer "to keep the benefits of an employee's labors." 328 U.S. at 687.

Petitioner acknowledges (Pet. 7-10) that representative testimony is sometimes appropriate to establish a minimum wage violation, but contends (Pet. 6) that, as a matter of law, a district court should not accept such testimony with respect to work performed at home. There is no basis in the case law

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[4] In *Secretary of Labor* v. *DeSisto*, 929 F.2d 789 (1st Cir. 1991), the court of appeals held that the testimony of one employee was insufficient to establish a pattern of wage violations, even under *Mt. Clemens*' "minimal burden" standard, for 244 employees holding a variety of positions at different locations. Recognizing that representative testimony was a well-accepted method of establishing wage violations in the absence of employer records, the court noted that "[u]sually, an employee can only represent other employees only if all perform substantially similar work." 929 F.2d at 793. In remanding that case for a new trial, the court of appeals distinguished the district court's decision in this case, noting that both testifying and nontestifying employees in this case performed the same job of home researcher, *ibid.*, and that the higher ratio of testifying to nontestifying employees in this case stood in "stark" contrast to the low ratio there. 929 F.2d at 793 n.2.

or in logic for this assertion.[5] Employers are required to maintain records showing the number of hours worked by homeworkers covered by the Act, 29 C.F.R. 516.2, 516.31, and their failure to do so creates the same difficulties of proof for homeworkers as it does for other classes of employees. Cf. *Marshall* v. *Van Matre*, 634 F.2d 1115, 1118-1119 (8th Cir. 1980) (applying *Mt. Clemens* paradigm to homeworker operation where employer failed to maintain records of hours worked). A rule prohibiting representative testimony in this context would contravene the teaching of *Mt. Clemens* that workers should not be penalized for their employers' failure to maintain adequate records by being held to an unduly stringent standard

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[5] Petitioner contends that representative testimony can be used to establish wage violations for a larger group only where (1) employees work together in regular shifts with supervision; (2) the employer has engaged in systematic falsification or fraud; or (3) there is "substantial other evidence" supporting the representative testimony, such as employer admissions or testimony from government investigators based on employee interviews or surveys. Pet. 7-10.

There is no support in the cases for this rigid tripartite formulation, and no court has adopted it. Cf. *Bel-Loc Diner*, 780 F.2d at 1116 (rejecting contention that Secretary was obliged to present testimony pertaining to each shift and stating that the "requirement is only that the testimony be fairly representational"); see also *Simmons Petroleum Corp.*, 725 F.2d at 86 n.3 ("Employer asserts that the rule that the use of representative testimony can establish a pattern of violations is limited to situations where the employees leave a central location together at the beginning of a work day, work together during the day, and report back to the central location at the end of the day. This rule is not supported by case-law."). In any event, the instant case satisfies petitioner's restrictions since the district court found that the testimony of the Department of Labor compliance officer constituted "substantial other" evidence of minimum wage violations.

of proof. 328 U.S. at 687-688. Under petitioner's theory, the Secretary could establish her case only by presenting the testimony of all 400 homeworkers as to their precise individual rates of production. Such a requirement places an onerous burden on both the Secretary and the district court and would, in many cases, obviate recovery. See *Dole* v. *Solid Waste Servs., Inc.*, 733 F. Supp. 895, 926 (E.D. Pa. 1989) (noting that refusal to allow representative testimony in a complex case would lead to a "mammoth" trial), aff'd, 897 F.2d 521 (3d Cir.) (unpublished opinions), cert. denied, 110 S. Ct. 3271 (1990); *Donovan* v. *Burger King Corp.*, 672 F.2d 221, 225 (1st Cir. 1982) (representative testimony avoids burdening the district court). Nothing in *Mt. Clemens* mandates this result.

2. Petitioner also challenges (Pet. 2-3, 14-16) the district court's use of an average production rate as a basis for its finding that the home researchers had "in fact performed work for which [they] were improperly compensated" and for the calculation of the amount of backpay due. Petitioner contends that it is not reasonable to calculate the total amount of backpay from an estimate of the researchers' average per hour production rate because the wide variation in work patterns casts doubt on the conclusion that the production rates of the testifying group reflect those of the workers as a whole. See Pet. App. A10.

In effect, petitioner challenges the district court's factual findings that the range of work rates established by the testifying researchers mirrors the larger group—that is, that the testifying group is "representative." In complaining of the Secretary's failure to demonstrate the statistical validity (Pet.

11) of this finding, however, petitioner misconstrues the burden of proof allocated in *Mt. Clemens*. Once the employee provides evidence of the "amount and extent" of a violation "as a matter of just and reasonable inference," the burden shifts to the employer "to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence." 328 U.S. at 687-688. Absent such evidence, the court may award damages "though the result be only approximate." *Id.* at 688.

Although petitioner had the opportunity to do so, it did not succeed in proving with precision the amount of work performed; petitioner's evidence, which consisted of tests it conducted indicating a higher average production rate, was rejected by the district court as inherently flawed and contrary to the testimony of the researchers themselves. Nor did petitioner demonstrate that the court's method for calculating backpay was unreasonable. The court's conclusion that the average work rate of the testifying group was "fairly representative" was plausible in light of the size of the representative group, and the uniformity of the task performed by all the researchers. Cf. *Secretary of Labor* v. *DeSisto*, 929 F.2d 789 (1st Cir. 1991) (testimony of one researcher inadequate to establish work habits of 244 workers performing many different jobs). It was up to petitioner to demonstrate, by statistical methods or otherwise, that the average production rate of the testifying researchers was not, or could not be, representative of all the workers. This petitioner failed to do.

In arguing that the approach adopted by the court is "inequitable" or disadvantageous to the employer,

petitioner focuses on the use of the 53 card per hour average rate used to calculate the amount of wages due the testifying employees, many of whom reported a higher or lower average rate of work. Pet. 14-15; see Pet. App. A43-A44. As petitioner recognizes, however (Pet. 2, 14-15), while the use of an overall average rate may overcompensate some employees, it *undercompensates* others. Because the testimony of a large number of employees was taken into account, and the employees' testimony was found to be representative, there is every reason to believe that such inaccuracies will balance out; and there is no reason to believe that petitioner's overall monetary liability is any greater than it would have been had the court heard testimony from more researchers, or attempted more precisely to calculate the back wages due the researchers who did testify.

In any event, it was clearly permissible under *Mt. Clemens*, 328 U.S. at 688, to use an average rate even though it might provide only an "approximate" measure of damages. As the district court explained (Pet. App. A30), whatever imprecision results from the use of representative testimony is directly attributable to petitioner's failure to maintain appropriate records. "The employer cannot be heard to complain that the damages lack the exactness and precision of measurement that would be possible had he kept records in accordance with the requirements * * * of the Act." *Mt. Clemens*, 328 U.S. at 688; see *Brock* v. *Seto*, 790 F.2d 1446, 1448 (9th Cir. 1986) ("*Mt. Clemens Pottery* leaves no doubt that an award of back wages will not be barred for imprecision where it arises from the employer's failure to keep records as required by the FLSA."); *Beliz* v. *W.H. McLeod & Sons Packing Co.*, 765 F.2d 1317, 1330-

1331 (5th Cir. 1985) ("Because precise evidence of the hours worked by each individual is not available due to the failure of [the employer] to keep adequate records, the workers may satisfy their burden with admittedly inexact or approximate evidence.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1991

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